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C

I

II

III

IV

V

T

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## CONTENTS.

|                                                                                    | Page. |
|------------------------------------------------------------------------------------|-------|
| I. Receivers' Certificates, . . . . .                                              | 594   |
| WILLIAM A. CARR.                                                                   |       |
| II. Notes, . . . . .                                                               | 666   |
| III. The Quiz,                                                                     |       |
| What is the Landlord's Right to Distrain for the Non-Payment<br>of Rent? . . . . . | 668   |
| LEWIS D. VAIL.                                                                     |       |
| LOUIS DE PUI VAIL.                                                                 |       |

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RECEIVERS'

C #

# CERTIFICATES

—BY—

WILLIAM A. CARR.

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J

## SYNOPSIS OF CONTENTS.

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|                                                                                                                       |    |
|-----------------------------------------------------------------------------------------------------------------------|----|
| I. Introductory, .....                                                                                                | 1  |
| II. Character of Receivers' Possession, .....                                                                         | 3  |
| III. General Character of Receivers' Certificates, .....                                                              | 8  |
| IV. Non-negotiability of Receivers' Certificates, .....                                                               | 12 |
| V. Authority of Courts to issue Certificates.<br>Upon the decided cases and upon principle, .....                     | 20 |
| VI. For what purposes Certificates may be issued, .....                                                               | 46 |
| VII. Who may contest Receivers' Certificates, .....                                                                   | 53 |
| VIII. The Rights of Lien Creditors upon an appli-<br>cation for an Order to issue Receivers' Cer-<br>tificates, ..... | 62 |



# *Receivers' Certificates.*

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## INTRODUCTORY.

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When we consider the rapid development of railroad corporations as instrumentalities of the commercial and business world, with the corresponding necessity of adapting legal principles to the new and varying exigencies of their business, the importance of a knowledge of the legal principles applied to the regulation of these vast concerns is at once apparent.

A study of the railroad history of our country discovers to us the many wrecks of these corporations, resulting in many instances from mere speculative experiments in which vast works have been undertaken, unwarranted by the necessities of the communities through which they passed; at other times the causes have been traceable to improvident management; and many have succumbed through depressions and panics in the business world. From these and other causes these wrecks became quite numerous and it became necessary to adapt or invent legal theories by which the affairs of these concerns representing such vast interests might be wound up and the claims of the various classes of credi-

tors adjusted. To meet these conditions, the courts adapted and applied the equitable doctrine of Receivers, and so extended that doctrine that they not only placed receivers in charge of the railroads of companies which had fallen into financial embarrassment, but also through the medium of receivers took upon themselves the management and operation of railroads as well.

This practice, by which courts of equity "go into the railroad business" has been introduced in many jurisdictions without Legislative sanction, as a jurisdiction belonging inherently to a court of equity. It seems, however, to be exclusively confined to American courts, and even in this country, the existence of such a jurisdiction as belonging inherently to a court of equity is not universally recognized. In those States in which the jurisdiction has been denied it has been conferred by statute. Thus the practice has been established in the American courts, and that it is firmly established as a practice is shown by a reliable exhibit of receiverships in which it appears that for the year 1893 alone, there were seventy-six roads in the hands of receivers, representing a mileage of 67,406 miles and a value in stocks and bonds of the large sum of \$3,382,487,000. The receivership for that year being almost double that of any year within the last ten years. That it is a practice that has been and is subject to much abuse and open to many objections cannot be doubted. That the advisability of courts engaging in the operation of railroads and especially the frequency of the practice may well be questioned, and is worthy of the most careful consideration admits also of no doubt. It will not, however, be within the province of this paper to enter into a discussion of the abuses and objections to which it is subject, nor of the merits to

which it is justly entitled, except as immediately pertains to the subject of receivers' certificates.

The doctrine of receiver's certificates is of very recent origin, being less than a quarter of a century old. They have attained a prominent position among railroad securities, as is evidenced by the large sums that are yearly secured by the issue of such certificates of indebtedness.

The subject of receivers' certificates derives its importance, not merely from the large investments represented by them, but from a legal standpoint it becomes also highly important in that the priority given them is apparently a violation of the established principles of the law of liens. The priority of lien given to receivers' certificates is a most striking example of judicial legislation, which encroaches very closely upon and amounts almost to an usurpation of legislative functions. If not an usurpation, it marks the boundary limit of the authority and power of courts to legislate, unsanctioned by the legislative department of government.

#### CHARACTER OF RECEIVERS' POSSESSION.

Courts of chancery sometimes take possession of property which is the subject of litigation by placing it in the hands of a receiver until the respective rights of the parties in interest can be fully ascertained and determined.

The possession taken by the receiver is only that of the court, whose officer he is, and he holds pending the litigation for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.

The method usually applied to banking, insurance and manufacturing companies is to shut down and stop by injunction all proceedings, take possession of the property in the condition it is found at the instant of stoppage, and sell it for what it will bring at auction. Property thus brought within the cognizance of a court of equity for administration and conversion into money and distribution is a trust fund. It is to be preserved for those entitled to it. This must be done by the hands of the court, through officers. The character of the property gives character to the particular species of preservation which it requires. Thus, unimproved land may be idle, with only payment of taxes. Improved property should be rented. Moveable property that is not perishable may be locked up and kept, but if perishable it must be sold, by way of preservation (1).

The new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company, has, however, rendered necessary the exercise of large and modified control over its property by the court charged with the settlement of its affairs and the disposition of its assets. One method is to give the receiver power to continue the ordinary operations of the corporations, to run trains of cars, to keep the tracks, bridges and other property in repairs, so as to save these from destruction and as soon as the interest of all parties having any title to or claim upon the corpus of the estate will allow, to dispose of it to the best advantage for all, having due regard to the rights of those who have priority of claims (2).

There are many reasons advanced why a court of

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(1). *Union Trust Co. v. Ill. Midland Co.*, 117 U. S. 435.

(2). *Barton v. Barbour*, 104 U. S. 126.



equity, when it deems it necessary for the protection of rights, to take charge of the property of a railroad company, should continue its operation through the medium of a receiver. The most important ones are, that these properties though vast in extent and value are very perishable if unused and neglected, and that to preserve its value it must be continued in operation and sold as a going concern, otherwise its business and goodwill will pass away.

That though, they are the estates of individuals, they are essentially public works in which the public at large and the State are concerned in their operations. That large communities become dependent on a railroad for numerous accommodations, and the inconvenience and loss, which would be inflicted on the population of large districts by the cessation of its business, would seem to require that its operations should be continued. That a railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation, it is a matter of public concern, and its construction and management belong primarily to the Commonwealth, which authorized it, and are only put into private hands to subserve the public convenience and economy. But the public retain rights of vast consequences in the road and its appendages with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public and must be content to enjoy them in subordination thereto. That it is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed, to carry on in the usual way those active operations for which it was

designed and constructed, so that the public may not suffer detriment by the non-user of the franchises (1).

While the power of the courts to appoint receivers for railroads is, at this day, undoubted, and when the power is exercised, the reasons for directing their continued operations are very strong ones, yet it is a power the exercise of which rests largely (in the discretion) of the court, and which in every case must be founded on its own special circumstances (2).

The application for the appointment of a receiver being addressed to the sound discretion of the court, and the exercise of such discretion not having to conform to established rules and precedents has become the subject of great abuse.

The emoluments of the office of receiver are so great, the patronage from the control of these corporations so large and the fees of counsel and masters are so liberal, that they, no doubt, prompt many of the applications for receiverships. That the inducements offered one to assume the duties of a receivership are very tempting is shown by the fact that a Chief Justice of the Supreme Court of one of our wealthiest States lately resigned his high post of honor in order to be appointed a receiver.

Whatever may have been the inducements or motives, applications for appointments of receivers have been numerous and in many cases granted. The practice has become too common, and has become a great evil. So great as to call forth the following from me of the ablest justices who ever adorned the bench of the United States Supreme Court (3).

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(1.) *Barton v. Barbour*, 104, U. S. 126; *Meyer v. Johnson*, 53 Ala. 234.

(2.) *Union Trust Co. v. Ry. Co.*, 4 Dill (U. S.) 114; *Williamson v. Ry. Co.*, 1 Biss (U. S.) 198.

(3.) Justice Miller in *Barton v. Barbour*, 104 U. S. 126.

"The appointment of receivers, as well as the power conferred on them, and the duration of their office, has made a progress which, since it is wholly the work of courts of chancery and not of legislatures, may well suggest a pause for consideration. Of the fifty or more (railroad corporations) who own or have owned the many thousand miles of railway in my judicial circuit, I think I speak within limits in saying that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the roads, collect the means of the companies and pay their debts, it might have been well enough. But this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He generally takes the property out of the hands of its owner, operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business; sometimes, though very rarely, pays some money on the debts of the corporations, but quite as often adds to them and injures prior creditors by creating a new and superior lien in the property pledged to them."

It is clear that many of the bad results attendant upon the appointment of receivers, spring from the unwise exercise of the power to appoint. That many receivers are appointed where there should have been no appointments. As receiverships are in some instances necessary for the protection of rights which would otherwise be destroyed, many of their objectionable features would be removed if the rule was adopted that a receiver should be appointed only when it is indispensably necessary to protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which can not be saved or protected in any other action or mode of proceeding.

This equitable jurisdiction is in a large majority of the cases of receiverships, invoked at the instance of mortgage bondholders, pending foreclosure proceedings, but being largely discretionary, in some instances the foreclosure suit has been allowed to proceed without the court taking possession and managing the railroad (1).

Receivers have been appointed upon the application of the mortgagor (2) and also at the instance of judgment creditors(3).

It is conceded by the courts that the appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens (4).

#### GENERAL CHARACTER OF RECEIVERS' CERTIFICATES.

The act of a court of equity in taking charge of property through a receiver is attended with certain necessary expenses for its care and custody; and it has become the settled rule that all the expenses occasioned by taking possession and administering the trust, including such expenses as are necessarily incurred in preserving the value of the property for the benefit of those entitled to it, are properly charged upon the property taken possession of, and should be paid out of the income, if any, or when necessary out of the corpus of the property before distribution or before the possession of it is relinquished by the courts and this is the rule, irrespective of

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(1). *Union Trust Co. v. St. L. etc. Ry. Co.*, 4 Dill. (U. S.) 114; *Williamson v. New Albany, etc. R. Co.*, 1 Biss. (U. S.) 198.

(2). *Quincy etc. R. Co. v. Humphreys*, 145 U. S. 382; *Central Trust Co. v. Wabash etc. R. Co.*, 34 Fed. Rep. 259.

(3). *Sage v. Memphis etc. R. Co.*, 125 U. S. 361; *Kneeland v. Luce*, 141 U. S. 491.

(4). *Kneeland v. American Loan Co.*, 136 U. S. 89.

the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership.

With the application of the doctrine of receivers to railroad corporations and the continuation of the complicated business of railroading intrusted to them, the question of expenses became a question of great importance.

The practice that expenses of custody and preservation, when the property of individuals and other corporations was in the hands of receivers, were properly charged upon such property was applied to receiverships of railroads. The courts not only applied such practice, but they extended it greatly beyond its original conceptions; and many expenses have been charged against railroad property unauthorized by any precedents from the past. From this extended practice there originated the doctrine of receivers' certificates.

In a receivership of a railroad, created and administered by the court, the expenses of administration are to be paid under the direction of the court, and, if the exigency should require, they may be made a first lien on the property (1).

Receivers' certificates are debentures issued by the authority of the court having the control through the medium of receivers, of property, usually railroad property, entitling the holder to satisfaction out of such property in preference to all other liens, for the debt for which they are given, or if the property is insufficient to satisfy all, to a pro rata share with other holders.

What may be called the leading case on the subject of receivers' certificates is *Meyer vs. Johnson* (2) in which

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(1). *Vermont etc. R. Co. v. Vt. etc. R. Co.*, 50 Vt. 500.

(2). *Meyer v. Johnson*, 53 Ala. 237.

the subject received the most careful consideration, both by counsel and the court. This was decided in 1874 and is one of the earliest cases involving a discussion of such certificates. It was there decided that receivers' certificates are but a substitute for common methods by which money is raised for the use of a receiver in a particular cause a mode of appropriating, in advance, a portion of the value of the property in order to save a greater value thereof from destruction.

They are not the debts of the company, but of the receivers backed by the pledged faith of the court, that the property on the proceeds of which they are charged, is in its possession subject to be, and that it will be disposed of by the court for their payment (1).

Certificates of indebtedness made by a receiver under the direction of the court bind no one personally, nor can any action be maintained on such instruments against any one. Only the fund or property under the control of the court is bound, and that only when it is equitable to charge such fund with the payment of the money evidenced (2).

Receivers' certificates being evidence of indebtedness can have no higher character than the debts of which they are representatives. So that if the claim is not one for which certificates were authorized, the debts can not be allowed priority even though certificates were issued for them (3).

Certificates have not the quality of negotiable instruments by the Law-Merchant. Power to issue certificates does not authorize the issue of a bond or other ne-

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(1). *Meyer v. Johnson*, 53 Ala. 237.

(2). *Turner v. P. & S. R. Co.*, 95 Ill. 154.

(3). *Fidelity Ins. etc. Co. v. Iron Co.*, 42 Fed. Rep. 372.

gotiable instrument which shall be good in the hands of a bona fide holder for value, no matter what vice or infirmity may attend its original creation. The paper issued must be governed by the authority under which it is issued, and not by the form the receivers may choose to give it (1).

In Illinois it has been held that a receivers' certificate is not commercial paper and is not such an instrument as is assignable at common law or under the statute (2).

As it usually appears on the face of such instruments by what authority they were issued and for what specific purpose, holders, therefore, will always be chargeable with notice of those facts (3).

The form of the order is sometimes prescribed by the court, and a copy of the order required to be printed on the backs of the certificates. In such a case the holder has direct notice of the extent of the receiver's authority to issue them (4).

It seems, also, that a holder would be chargeable with notice of the order of the court under which they were issued, whether such order appeared upon the certificates or not.

However, under a well known rule of construction the order of the court, authorizing the issue of certificates, is strictly construed. The power to displace contract liens is considered as such a dangerous power, that it is not to be extended by implication (5).

It has been held that receivers' certificates are practically "call loans," and the holders have the right to as-

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(1). *Stanton v. Ala. etc. R. Co.*, 2 Woods 506.

(2). *Turner v. Ry. Co.* 95, Ill. 154.

(3). *Turner v. Ry. Co.*, 95 Ill. 154.

(4). *Turner v. Ry. Co.*, 95 Ill. 154.

(5). *Tennessee v. R. Co.*, 6 Lea. 353.

sume that the receiver, the court's officer, would notify them when the loan was to be called, or the money paid (1).

The issue of receivers' certificates, or the execution of other similar obligations does not simply give to the holder a lien which he may enforce in any of the ordinary methods of judicial foreclosure, but it is the duty of the court to see that contracts made by its orders are performed, and that it ought not to remit the holder of such a contract to the remedies of lien or debt holders, but on the mere suggestion of omission or failure, the court should take measures to secure performance, and such measures as will most certainly and promptly secure it (2).

The most striking characteristic given to receivers' certificates by the authority of courts, is that they are declared to be a lien on the line and property in respect of which they are issued, superior in lien to all mortgage bonds and other debts of the company, although founded upon the most solemn contracts and assured by the registry laws.

#### NON-NEGOTIABILITY OF RECEIVERS' CERTIFICATES.

The principle feature of a negotiable instrument when it is negotiable in the full sense of the word, as used in commercial circles, is, that a bona fide holder for value and without notice, takes it free from equities that may exist between the original parties.

It is this feature which gives such an instrument its value as a paper to be used in trade and commerce, for not being subject to equities between the parties to it,

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(1). *Mercantile Trust Co. v. R. Co.*, 50 Fed. Rep. 874.

(2). *Loan and Trust Co. v. R. Co.*, 32 Fed. Rep. 805.



it becomes a safe and easy method by which credits can be interchanged. In order that an instrument may have the qualities of a negotiable instrument according to the Law Merchant, the money which it is evidence of, must be payable at all events, not depending upon any contingency, either in regard to the event, or the fund out of which payment is to be made or to the parties by or to whom payment is to be made.

The mere fact that an instrument is made payable to the order of the payee, or to the bearers, does not make it negotiable in the sense that the holder will not take subject to equities of original parties, unless the paper is negotiable in its nature. Thus a paper may be negotiable in the sense that the claim it represents passes from hand to hand, by mere delivery or by indorsement, but not in the sense that the holder takes free from equities. An example of this is shown in bills of lading. They pass from hand to hand by delivery and indorsement, but the holder's title is subject to the equities of original parties; and a statute declaring them to be negotiable was construed to mean that the title could be passed by indorsement or delivery, but that the Legislature could not have meant to make them negotiable in the full sense of the word (1).

Receivers' certificates are negotiable only in the sense that the title to them can be transferred by delivery or indorsement, but in no other sense (2).

Nearly every quality essential to the negotiability of commercial paper is wanting in such certificates. They are not payable unconditionally out of any fund; whether, in any event, they are payable in full, depends

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(1). *Shaw v. Bank*, 101 U. S. 557.

(2). *Newbold v. R. Co.*, 5 Bradw. 367.

on the question, whether the fund under the control of the court is sufficient for that purpose, nor is there any promise on the part of the signor to pay (1).

They are sometimes contingent as to the fund out of which they are to be paid. Thus, where they were to be deferred to operating expenses out of surplus earnings but were to remain a charge upon the railroad (2).

A receiver's certificate is a mere acknowledgment that a debt is due the payee, payable out of a specific fund and has none of the elements of a negotiable instrument (3).

They have not the quality of negotiable instruments by the Law Merchant. Power to issue certificates does not authorize the issue of a bond or other negotiable instrument which shall be good in the hands of a bona fide holder for value, no matter what vice or infirmity may attend its original creation (4).

There is however one case in which the court directed the receiver to issue certificates and make them negotiable (5).

It was there said that as courts of equity have the capacity and duty to adapt their decrees to all varieties of circumstances which can arise, and adjust them to all the peculiar rights of all parties in interest, that from the nature of railroad property the court must possess the power after notice to and hearing of the parties interested, to borrow money for the economical management and conservations of the property until it should be disposed of, and that if it cannot borrow otherwise, it can do

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(1). *Turner v. Ry. Co.*, 95 Ill. 134.

(2). *Bank v. Hazard*, 30 Fed. Rep. 484.

(3). *McCurdy v. Bowes*, 88 Ind. 513.

(4). *Stanton v. Ala. etc. R. Co.*, 2 Woods 506.

(5). *Meyer v. Johnson*, 58 Ala. 287.

so in sufficiently large sums by issuing negotiable certificates of indebtedness constituting a first lien on the proceeds of the property.

Even if courts of equity have such a power as thus claimed in *Meyer vs. Johnson*, they have guardedly refrained from exercising it. The court in *Meyer vs. Johnson* may possibly have used the word negotiable in the limited sense of making the title transferrable by indorsement or delivery, but if it used the word in its full commercial sense, it certainly advocated the existence of a very dangerous power. The exercise of such a power would put into the hands of the receiver the power to deprive the stockholders of their security. They would be entirely at the mercy of the receiver. A receiver being directed to issue certificates could issue them for greater amounts or for different purposes, than authorized by the court, and by a transfer by the payee to a bona fide holder the stock or bond holders would have no right to contest their validity in the hands of the innocent indorsers as they could have done, if the instrument was not negotiable. Fortunately the courts have not followed *Meyer vs. Johnson* in this respect and such certificates are not made negotiable.

A receiver's certificate not being negotiable is subject to the same defences in the hands of the holder, notwithstanding he may have in good faith paid full value therefor, as could be made against the original payee (1).

Where the receiver exceeds his authority and disposes of the certificates at a greater discount than authorized by the order the first taker or his assignee is only entitled to the extent of money actually advanced (2).

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(1). *Turner v. Ry. Co.*, 95 Ill. 134.

(2). *Stanton v. Ala. etc. R. Co.*, 2 Woods 506.

Or, where a receiver without authority negotiates at a discount, a bona fide holder will only be protected to the amount actually advanced by the first purchaser, although he paid the full amount (1).

If a receiver issues certificates for an unauthorized purpose, the first taker derives no title from the transaction and the subsequent holders occupy no better position whether they are bona fide holders or not (2).

However, if the certificates were authorized to be disposed of at a discount, the holders are entitled to recover the face per cent. value of the certificates, and are not limited to a recovery of the amount actually advanced to the receiver (3).

A receiver has no right to agree to pay more for money borrowed than the rate authorized by the order, and the first taker or his assignee is only allowed the interest authorized by the order (4).

Nor has the receiver any right to borrow money on certificates, to be paid before the time specified in the order when the certificates should fall due, nor can an assignee enforce payment before that time, although certificates were made to fall due before that time (5).

A receiver cannot without express authority from the court, delegate his power to negotiate the sale of certificates to another. Such a power is a personal trust reposed in him. Thus where a receiver without such authority made certificates payable to another, for the purpose of having him negotiate their sale, and the payee sold them but did not account for the money, the as-

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(1). *Bank v. Hazard*, 30 Fed. Rep. 484.

(2). *Stanton v. Ala. etc. R. Co.*, 31 Fed. Rep. 585.

(3). *Union Trust Co. v. Ill. Midland Co.*, 117 U. S. 436.

(4). *Stanton v. Ala. etc. R. Co.*, 2 Woods, 506.

(5). *Stanton v. Ala. etc. R. Co.*, 2 Woods, 506.

signee for value and without notice took it subject to all the equities between the original parties and as the payee could not enforce their payment, neither could the assignee (1).

However, the purchasers of certificates authorized by order of court are not bound to see to the application of the proceeds (2).

Those who take receivers' certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property, and who have not, but should have been brought before the court. They take the risk of the final action of the court in regard to the loans (3).

Assignees have the right, however, to rely on the their face, when, the consent of the trustees and thus of promise of the court as to their priority plainly borne on the bondholders was given to their issue, and it is then immaterial as to what was the purpose of their issue. As where they were issued for building a division that was not subject to the mortgage of the bondholders, yet the certificates were ordered paid out of the proceeds of entire road (4).

When the form of the certificate was prescribed by the court and the order recited that such certificates were to be made payable to the party to whom it was to be delivered or his order. And the receiver issued certificates payable to payee or bearer, the holder having received it from payee by mere delivery was not in fact an assignee of the certificates according to the order (5).

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(1). Union Trust Co. v. R. R. Co., 7 Fed Rep. 513.

(2). Union Trust Co. v. Ill. Midland Co., 117 U. S. 438.

(3). Union Trust Co. v. Ill. Midland Co., 117 U. S. 435.

(4). Kneeland v. Luce, 141 U. S. 491.

(5). Turner v. Ry. Co., 95 Ill. 134.

When the certificates on their face state they were issued under and by virtue of the order, the assignee is chargeable with notice of all such order contains. Whether under the order the receiver had the power to issue securities for the purpose for which they were issued, were legal questions which the assignee was bound to determine at his peril. The receiver's authority was bounded and limited by the order, and being an officer of the court, intrusted with the care of property in his charge as such officer, the assignee was bound to know whether the certificates were issued in accordance with terms and contingencies contemplated by the order. The assignee is not such a holder as will cut off the equities existing between the original parties to the certificates (1).

In that case the receiver was to issue certificates for "materials furnished," and it was thus held that an assignee of such certificates was bound to know at his peril whether the materials had really been furnished.

But, if in issuing certificates, the receivers wilfully and corruptly exceed their powers, they can be held liable for the actual damages sustained by their conduct (2).

Thus, in an action brought by a bona fide assignee who purchased certificates in good faith before maturity and without notice, the plaintiff's statement charged the receiver with "wrongfully and fraudulently" issuing them. To this the defendant demurred and it was held that as the receiver by demurrer admitted the allegations that he issued them fraudulently he was liable (1).

In order to render the receiver liable it is not necessary that he should have a purpose to defraud and de-

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(1). *Bank of Montreal v. Ry. Co.*, 48 Ia. 518.

(2). *Bank v. Thayer*, 7 Fed. Rep. 622.

ceive the plaintiff assignee, in particular, when he executed the instruments. He may not have any particular one in his mind at the time of issuing them, but still if he issued them "fraudulently" he would be liable to any bona fide purchaser who relied on the representations that the certificates were issued in pursuance of an order of the court (1).

An honest mistake can not be made the ground of an action for fraud. There must be an intent to defraud by false representations, so that if the receiver issues the certificates honestly and in good faith, believing he had the right to do so, this is a perfect defence but must be pleaded by way of answer (2).

Nor are representations in certificates that they are issued in pursuance of an order of the court, warranties upon which an action could be brought by the assignee (3).

The receiver was, however, in *Bank vs. Thayer*, given leave to withdraw his demurrer, and make a defence upon the grounds that he made an honest mistake. The court intimating that the purchaser could only recover upon proving the intent to defraud by executing the certificates and placing them upon the market.

As a receiver's certificate is not negotiable, an assignee can not recover from his assignor on a failure to receive the amount of the certificates from the receiver's fund. The assignor is not chargeable as an ordinary indorser of a note or bill. No recovery can be had upon this ground for the reason that the instrument is not negotiable as commercial paper (4).

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(1). *Bank v. Thayer*, 7 Fed. Rep. 622.

(2). *Bank v. Thayer*, 7 Fed. Rep. 622.

(3). *Bank v. Thayer*, 7 Fed. Rep. 622.

(4). *McCurdy v. Bures*, 88 Ind. 588.

Neither is the assignor of such a certificate liable as the assignor of a non-negotiable promissory note, because there is no promise on the part of the signor to pay, and the instrument is payable out of a specific fund, and does no more than evidence a claim on that fund (1).

It is quite clear that an assignor of a certificate of indebtedness issued by a receiver is not bound as a guarantor, for the law annexes no such incident to his assignment. Even a verbal contract of guaranty would not support an action for it would be within the statute of frauds as a promise to pay the debt of another (2).

It may be that such an assignment warrants the genuineness of the instrument, the capacity of the signor to execute it, the title of the assignor and his good faith, but not that the certificate was collectible and would be paid (3).

**AUTHORITY OF COURTS TO ISSUE CERTIFICATES UPON  
THE DECIDED CASES AND UPON PRINCIPLE.**

The governing principles upon which priority of lien is based are that the vested rights of incumbrancers and lien holders cannot in any manner or to any degree be impaired or displaced, when once attached, by any rights subsequently accruing. It is an essential principle and the one from which a lien derives its greatest value, that a claim arising at a subsequent time is subordinate and, therefore, not entitled to any share of the fund derived from a sale of the property upon which the lien attaches, until full payment of the debt secured by the lien has been made. The law has always protected valid liens against encroachments from subsequent claims and for

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(1). *McCurdy v. Buves*, 88 Ind. 583.

(2). *McCurdy v. Buves*, 88 Ind. 583.

(3). *McCurdy v. Buves*, 88 Ind. 583.



their greater security, all the States have passed registry laws. Notwithstanding the favor of the law and the protection of the registry acts, the priority of the lien of mortgages and other liens upon railroad property is taken away under the doctrine of receivers' certificates and given to such certificates, although such liens had attached long before. It is, of course, manifest that if this is done at the request or with the consent of such lien holders, no objection can be urged by others. But when no such consent is given, upon what principles or by what authorities can such a practice be justified? Is such a practice firmly established and what are the decisions advocating that the courts possess such a power?

In *Martin vs. The Somerville Co.* (1) decided in 1856, the court in construing a statute of New Jersey, which provided for the sale of the property of a manufacturing company, free from all incumbrances said: "The obligation of this contract is moreover impaired by this act, in that it gives a precedence to certain indefinite costs and charges (not costs of the sale merely) to be paid out of the proceeds of the property before the mortgage debt. This is in direct contravention of the contract by which It is clear that any legislation which defeats the estate of the mortgagee, without payment or tender of the whole debt due on the bonds, which gives a preference to liens, and which deprives the mortgagee of his remedy given by the covenants of his contract, as also that given by the law of the land "impairs its obligation."

This case had in question the property of a manufacturing company and is authority for the position, which, however, hardly needs any authority to support it, that the Legislature of a State can not give a precedence to

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(1). 3 Wall. Jr., 214.

claims subsequent to a mortgage. That such an act would be an "impairment of the obligation of a contract" and therefore void. It would also seem that if a State could not so impair the obligation of such a contract, that the court, which is only a department of the State, would surely not have such power.

Does the fact that it is railroad property that is the subject of a mortgage, give the State or its courts any greater authority to give precedence to subsequent claims over such mortgage than if it were other property?

The first case in which receivers' certificates were issued and given a priority over existing mortgages was *Sutherland vs. R. R. Co.*, cited in *Meyer vs. Johnson* (1). In that case the receiver was authorized to issue certificates which should constitute a first lien on the property and to execute and deliver a mortgage trust deed thereof to secure payment of such certificates. In commenting on this case the court in *Meyer vs. Johnson* said: "The court by this conveyance to a trustee, put the property even out of its own control, and appears to have disposed of it as if invested itself with a sort of seigniorial title that enabled it to supersede the existing rights of others therein, and to have exercised legislative power by authorizing the borrowing of money without regard to usury laws." That case came before the United States Supreme Court in *Jerome vs. McCarter* (2), in which it appears that the certificates were necessary in order to save a land grant which would revert to the government if the road was not finished within a certain time. The court then said: "Whether the action of the court could

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(1). 53 Ala. 237.

(2). 94 U. S. 734.

make the receiver's mortgage superior in right to the mortgages which existed when it was made, it is needless to inquire. None of the creditors secured by those other mortgages objected to the order when it was made, though they were all then in court. None of them object to its lien or its priority now."

The next case in which an order was given to issue first lien certificates was *Adams vs. Ala. etc., R. R. Co.* (1872), cited in *Meyer vs. Johnson*. The order in that case was made by Justice Bradley, and authorized the receiver "to put said railroad and other property in repair, and to complete any incompleated portions thereof." The court in *Meyer vs. Johnson* said that although the case was very urgent, it was not until "the parties interested" consented, that "Justice Bradley made the order so much relied in this cause, and which has attracted so much attention from the legal profession."

In *Kennedy vs. St. Paul, etc., R. Co.* (1), 1873, the court authorized the construction of a large extension of the road in order to save a land grant which was the only security of any considerable value, which the parties had for their large advances. The court said in granting the application for a receiver with power to issue first lien debentures: "It seems to me that the exigencies of the case are such as, under the circumstances, to warrant the court, upon the application of the parties chiefly interested, to appoint a receiver and to clothe him with the powers desired."

Another case which is also cited in *Meyer vs. Johnson* is *Hyde vs. Sodus Point R. Co.* In that case an order was made in 1874 authorizing the issue of first lien certificates, for the purpose of making repairs and of con-

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(1). 2 Dill. 448.

structing connections with other railroads. As pointed out in *Meyer vs. Johnson* the order was made at the request of the mortgage bondholders and with no opposition from any one having an interest in the property.

It will be seen by these cases that they afford no support whatever for the claim that a court of chancery has power to divest the lien of prior incumbrances, when the holders of those incumbrances object. In the last three the lien creditors expressly consented to the order for certificates and in the first one, they did not object at the time the order was made nor at any other time.

It was not until *Meyer vs. Johnson* (1), 1875, that the practice was introduced that a court of equity might authorize its receiver of railroad property to issue certificates of indebtedness and give them a priority over established liens, in opposition to the objections of the holders of such prior liens.

The court in that case denied the power of the chancellor to issue first lien certificates in order to raise money to complete the unfinished road. The court said: "If the railroad company itself, the corporation created by the State to build, equip and operate a work useful to the public, though belonging to the company, cannot, when its enterprise is about to fail, and its labor and expenditures to be lost, give those who shall then come to its aid and help to complete its obligations which, like those given by the master of a vessel abroad and in distress, shall have priority over others previously contracted.

What prerogatives of a court of equity entitles the chancellor to step in and do so instead of the company?"  
It then points out that contracts should be inviolable, and that the law will not permit the obligations of them

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(1). 53 Ala. 237.

to be impaired. That the Constitution of the United States inhibits a State from doing an act which shall have that effect, and that a court which is only a portion of the government of a State, cannot have a power denied to the State. That a chancellor, who authorizes the completion of an unfinished work or of enlarging or improving a finished one beyond what is necessary for its preservation, and for that purpose raises money by charging the railroad and its appurtenances with liens which are to supersede the older ones without the consent of the holders of these, has passed beyond the boundaries of a chancellor's jurisdiction. That the objections to such transactions are that they are necessarily, to some extent, speculative; that they arbitrarily unsettle interests founded on the most solemn contracts; and that the court in conducting them abdicates its judicial function, and exercises another more akin to that of a bureau of an executive department of the interior.

The court in *Meyer vs. Johnson*, after this strong arraignment of the claim that the chancellor has the power to issue first lien certificates for the purpose of completing or improving a road, then turned its attention to the question as to whether the court was competent to issue such certificates when necessary for its custody and preservation. The court declared that the question was not at all identical with that of certificates for completing or improving a road.

It is hard to see any material difference, except one of degree, between an expense for making improvements or finishing a road, and an expense for putting the road in repairs, and if one cannot be given a priority without the consent of lien creditors what reason is there why the

other should not also require their consent before a priority is given it? It is clear that the railroad company itself could not make repairs necessary to the operation of the road, and issue obligations which should have a priority over existing liens without the consent of the lien creditors. Such an act would clearly impair the obligation of its contract. The question asked by the court in *Meyer vs. Johnson* concerning obligations for the completion or improvement of the road might well be repeated.

"What prerogative of a court of equity entitles the chancellor to step in, and do so instead of the company?" Is it any the less an impairment of the obligation of the contract, that it is done by direction of a court of equity than if it has been done by the party? There seems to be no difference, for in either case the result is the same."

This is the way the court in *Meyer vs. Johnson* justified the issuing of first lien certificates of indebtedness to the amount of \$700,000 for the purchase of rolling stock and putting the road in repairs. After first showing that expenses incurred by the receiver in taking property into custody and selling it, would be paid out of the income or if the income was inadequate, out of the corpus of the property in preference to liens (and about this there can be no question), the court said: "Is this the limit beyond which a court of chancery may not go in such matters in any case? It was not necessary that the question of the power of a court to authorize the issue of first lien certificates of indebtedness to enable a receiver to raise money he might need, should be decided before the introduction of railroads. But these properties with their appurtenances, vast in extent and value, yet very perishable if unused or neglected, existing as the estates of private indi-

viduals associated into corporations, but essentially public works, in whose operations the public at large and the State are concerned, when drawn into litigation, must be dealt with by the courts according to the nature and circumstance of the subject. And any one can understand that the best and cheapest mode of conserving a railroad may be by operating trains thereon and keeping it in repair for their use. To preserve its value, it must generally be continued in operation, and be sold as a going concern. If it were not for the public quality belonging to them for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a chancellor might say to the parties most interested unless you furnish means for the protection of this property, which does not itself afford an adequate income for the purpose, it may become a dilapidated and useless wreck. But the inconvenience and loss which this would inflict on the population of large districts, coupled with the benefit, to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value and derangement and disorganization that would otherwise result seem to require, not for the completion of an unfinished work or the improvement beyond what is necessary for its preservation of an existing one; but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it, that the court should borrow money for that purpose, if it cannot otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued constituting a first lien on the proceeds of the property and redeemable when it is sold or disposed of by the court."

As thus seen the court based its decision principally upon the fact that if rolling stock is not secured and repairs not made, the public will suffer great inconvenience and loss, and thus the public interests are protected by sacrificing the interests of lien creditors whose money made it possible for "whole communities to become dependent on a railroad for accommodations in a thousand things."

The security of a debt by establishing it as a lien upon property, is in itself property and in many cases is that which gives value to a debt, for without it the debt may never be satisfied. So that if as in this case such priority is divested to the amount of \$700,000, does it not amount to a taking of private property for a public use? It would seem to have that effect and would, therefore, require compensation or such taking would be unconstitutional.

The court in *Meyer vs. Johnson* afterwards points out what it considers as weighty objections. "The property does not belong to the court or receiver. It is in their hands only while proceedings are pending to determine the respective rights of parties litigant. What title can any instrument made by them transfer in that which belongs to others?"

It answers this by saying: "True the property is in the keeping of the court to be taken care of; but also to be sold and out of the proceeds the expenses of taking care of it must be paid."

Is this a sufficient answer to the objection the court points out? If the court actually meant that only "expenses of taking care of it" should be paid, it is probably a sufficient answer, for there can be no doubt that when mortgage or other lien creditors ask a court of equity to



appoint a receiver to take charge of and operate a railroad that they thereby consent that the expenses of taking in custody, of operation, and of sale shall be paid out of the income or the proceeds of sale in preference to their own claims, but they can not be held to consent to extensive repairs and large purchases of rolling stock. It seems like stretching the sense of "taking care" of property, when under that is included the addition of almost half a million dollars of rolling stock and repairs worth a quarter of a million dollars.

Of course, if the value of the property was increased by such expenditures the lien holders would have no cause of complaint, but common experience has taught that such outlays seldom, if ever, increase the salable value of the road in proportion to the outlay.

The court (as above) shows its solicitude for the parties in interest by pointing out that the property will diminish in value and then for the "benefit of parties who perhaps are powerless to take care of themselves," authorizes the creation of a new lien for a large amount which shall have priority over their liens. This is certainly a very questionable "benefit" and such a "benefit" as should not be conferred without the consent of or a request from such "beneficiaries."

The court in *Meyer vs. Johnson* also pointed out another objection, which amounted to a true prophecy. It said: "It may also be said, such a power will be abused. Rash or facile chancellors may be persuaded to issue more certificates than are necessary for the mere conservation of the property; and when out they must all be redeemed; else, the whole scheme of raising money in this manner fails and the court is brought into disrepute."

That this was a true prophecy is shown by the many

cases where the mortgage bond holders security was rendered almost valueless by the issuing of such certificates. An illustration will suffice. Judge Baxter of the United States Court in passing upon an application concerning a receiver of a railroad took occasion to remark that the practice of placing railroads in the hands of receivers had become a great evil. He cited the case of a railroad in Georgia which cost \$15,000,000. The receiver who was in charge for three years issued certificates to the value of \$1,500,000 and when the road was sold the proceeds were not sufficient to pay the certificates. In another case, in Detroit, a road cost over \$8,000,000. When the road came to be sold eminent counsel requested the judge to fix the minimum price for the sale, suggesting that said price should be a sum sufficient to cover the charges of the receiver and his lawyer (1).

Has this practice as laid down in *Meyer vs. Johnson* been adopted by other courts so that it can be said to be an established practice about which there would be no hesitancy in following?

*Stanton vs. Ala. etc., R. Co.* (2) (1875), was the outcome of *Adams vs. Ala., etc., R. Co.*, discussed in *Meyer vs. Johnson*. Certificates issued under the order given in *Adams vs. Ala., etc., R. Co.* were in question. As was shown in *Meyer vs. Johnson* that order was given only after the parties interested "consented," and they were further protected by the order making it necessary that the trustees of the mortgage bond holders should countersign the certificates. As was said in the opinion: "The power of the court is now open to inquiry." Considered in relation to the order in this case and the fact

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(1). 11 Chicago Legal News 2.

(2). Woods 506.

that the parties affected by the certificates consented this case does not support *Meyer vs. Johnson*.

In the case of *Wallace vs. Loomis* (1) the order given in *Adams vs. Ala., etc., R. Co.* came before the Supreme Court of the United States. *Wallace vs. Loomis* is usually cited as a leading case affirming the doctrine of *Meyer vs. Johnson*. Justice Bradley in delivering the opinion of the court said: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment cannot at this day be seriously disputed.

It is part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is undoubtedly a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund." This language is usually cited as authority for the existence of such a power, and taken by itself is certainly broad enough for that purpose, but when considered in connection with the order about which it was made, and the fact that the parties in interest had asked for and consented to it the language was unnecessary for the decision the court was called upon to make, and thus being extra-judicial, it cannot be considered as fully determining the question. Besides this, the Justice after making use of the language as above, points out the fact that the parties had either expressly consented to the or-

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(1). 97 U. S. 146.

der, or offered no objection to it. He then says: "The bondholders were represented by their trustees, and must be regarded as bound by their acts, at least so far as concerns the power of the court to act in making the order, and so far as the interest of third persons acting upon the faith of it might be affected."

The opinion itself shows that the power of the court to make the order was derived from the consent of the parties.

In *Kennedy vs. St. Paul, etc., R. Co.* (1) (1878), an application was made expressing the wishes of all the bondholders, for an order authorizing the receiver to issue first lien certificates for the purpose of raising money to complete the road and save a land trust, which was their principal security. Notwithstanding that the parties in interest desired it, the court refused the request, saying: "That such authority ought not be given without an overwhelming and irresistible necessity." This case is authority for the position that certificates will not be authorized for purposes of completing a road even though a request is made by all the parties.

In *Bank of Montreal vs. C. C. & W. R. Co.* (2) (1878) and *Snow vs. Winslow* (3) (1880), the same order was before the court. It authorized the completion of the road and the issue of certificates. They are not authority as to what the power of a court might be, for the former only decided that certificates were not validly issued according to the order and the latter that such an order was not binding upon a lien creditor who had not been made a party when the order was made. And in neither case

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(1). 5 Dill. 519.

(2). 53 Ia. 518.

(3). 48 Ia. 201.

does it appear that the parties who were present offered any objections at the time the order was made.

In *Barton vs. Barbour* (1) the question was not as to the power of the court to make such an order, but merely as to whether a person who sustained an injury owing to negligence of the employes of a road in the hands of a receiver, could bring an action against the receiver without obtaining leave of the court that appointed the receiver. The court, however, did discuss the question of the power of a court to direct the continued operation of a road in the hands of a receiver. It said, in speaking of railroads: "But the public retain rights of vast consequence in the road and its appendages, with which neither the company nor any creditor or mortgagee can interfere. They take their rights subject to the rights of the public, and must be content to enjoy them in subordination thereto. It is, therefore, a matter of public right by which the courts, when they take possession of the property, authorize the receiver or other officer in whose charge it is placed to carry on in the usual way those active operations for which it was designed and constructed, so that the public may not suffer detriment by the non-user of the franchise. And in most cases the creditors can not complain, because their interest as well of the public is promoted by preventing the property from being sacrificed at an untimely sale, and protecting the franchises from forfeiture for non-user. It has come to be settled law that a court of equity may and in most cases ought to, authorize its receiver of railroad property to keep in repair and to manage and use it in the ordinary way until it can be sold to the best advantage of all

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(1). 104 U. S. 126.

interested." It then cites *Wallace vs. Loomis* (1), as its authority, but as we have seen, in that case the parties in interest had consented to the order. As authority in support of *Meyer vs. Johnson* this case like *Wallace vs. Loomis*, is open to the objection that it was extra judicial and not necessary to the decision.

There is but very little force in the argument that the lien creditors are protected from having the franchises forfeited as an argument that certificates may be issued when those affected object. If the franchises were in danger of forfeiture while the road was in the hands of receivers the lien creditors would, no doubt, consent to certificates for repairs, etc., that would be necessary to save the franchises from forfeiture, and thus the same purpose would be accomplished without a palpable sacrifice of the principles of liens, and the interests of lien creditors would not be put to the mercy of a power depending for its exercise and the extent of its exercise upon the discretion of a court.

*Miltenberger vs. Logansport Ry. Co.* (2) is sometimes cited as sustaining the doctrine of *Meyer vs. Johnson*. In that case foreclosure proceedings were instituted by the trustees of a second mortgage, and a receiver was appointed. The trustees of first mortgage were made parties. The certificates objected to by the first mortgage bondholders were issued for the purpose of saving rolling stock which would be lost if a balance was not paid and for the completion of advantageous connections, etc. The court used the following language as showing that the objections against the certificates were not well taken.

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(1). 97 U. S. 176.

(2) 106 U. S. 286.

"It was at all times competent for the first mortgage trustee, as a party to that suit, to have asked the court to protect the interests of the bond holders, in case the receiver was disregarding them; and the cross-bill could as well have been filed earlier as later by the plaintiffs in it or by other bond holders. On the other hand, it did not comport with the principles of equity for the appellants to lie by and see the court and the receiver dealing with the property in the manner now complained of, and content themselves with merely protesting generally and disclaiming all interest under the receivership, and yet assert, that the road built, the rolling stock, and other property acquired by the receiver, and now alleged to have been acquired by him without authority, were subject to the lien of the first mortgage.

A court of equity, however it might act on the question of original authority or discretion if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit, or of those represented by him."

The court as thus shown rested its decision upon the fact that the first mortgagees had been made parties to the suit and had full knowledge as to what was being done by the receiver in creating the claims they afterwards disputed, and if they wished to object to such claims, they should have done so promptly and not have waited until other persons acting upon the orders had acquired rights therein. Not having objected in time, they were guilty of laches and, therefore, estopped from afterwards questioning such claims. The court after giving these wholesome reasons sustaining the certificates, com-

mented upon *Wallace vs. Loomis*, with approval, and also upon *Barton vs. Barbour* as to the protection due the public interests. As was said before of *Wallace vs. Loomis* and *Barton vs. Barbour*, the decision when considered in relation to the facts does not support *Meyer vs. Johnson* but the language does have that effect.

About the strongest case sustaining the doctrine of *Meyer vs. Johnson* is *Union Trust Co. vs. Ill. Midland Co.* (1). The court there said (2): "A railroad and its appurtenances is a peculiar species of property. Not only will its structures deteriorate and decay and perish if not cared for and kept up, but its business and goodwill will pass away if it is not run and kept in good order. Moreover, a railroad is a matter of public concern. The franchises and rights of the corporation which constructed it were given not merely for private gain to the corporations, but to furnish a public highway; and all persons who deal with the corporation as creditors or holders of its obligations, must necessarily be held to do so in the view, that if it falls into insolvency and its affairs come into a court of equity for adjustment, involving the transfer of its franchises and property by a sale into other hands to have the purposes of its creation still carried out, the court while in charge of the property, has the power, and, under some circumstances, it may be its duty to make such repairs as are necessary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent, nor on prior notice. Consent is desirable, but is seldom practicable where the debts exceed the value of the property."

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(1). 117 U. S. 435.

(2). P. 455.



This is certainly very emphatic language to the effect that consent of those to be affected by receivers' certificates is not essential to the power of a court to authorize their issue. The court also directly approves *Meyer vs. Johnson*. On page 463 it says: "The general principles hereinbefore stated, on which the receiver's certificates referred to are allowed, are those sanctioned in *Meyer vs. Johnson* and *Hoover vs. Montclair, etc., R. Co.* (1)."

The facts in the case of *Union Trust Co. vs. Ill. Midland Co.* were as follows: A receiver was appointed at the instance of the stockholders and of judgment creditors. The Union Trust Company was the trustee for the bond holders who were contesting the priority of certificates issued by the receiver. The first order authorizing certificates was made when neither the trustee or the bond holders were parties to the suit, but the trustee was admitted as a party before the other orders were made; and the fact appears that default in payment of interest upon which all bonds had become due and their lien had become enforceable had occurred several months before the first order was made. It does not appear that the trustee or bondholders offered any objections at the time the orders were made. The court on pages 459 and 460, after pointing out that the lien of the bonds had become enforceable before the orders were made, said:

"The interest on the.....bonds had been in default since January 1, 1876 (the first order was made October 9, 1876), and the receiver was in possession of the entire line of road and running it and exercising the powers which the orders of the court had conferred upon him. Under these circumstances the .....trustee and its bond holders in court, through it, can be heard to make

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(1). 29 N. J. Eq. 4.

no objections to the orders except such as arise as to the merits of the expenditures made under them," and again on page 463, after the language in support of Meyer vs. Johnson, "The strenuous contention on the part of the bondholders is that a court of chancery had no power, by a receiver and without their consent to create on the corpus of the property any lien taking priority over the mortgage lien." Now see how the court answers this: "But these bondholders were represented by their trustee, the Union Trust Company," and then after again pointing out the terms of the mortgage and the fact that the bonds had become due and the lien enforceable before any of the orders had been made, it continues: "In the face of these provisions of the mortgage under which the bonds are held, and of the facts before recited as to the negligence of the trustee all the while the property was in the hands of the court, it does not at all comport with the principles of equity for the bondholders now to insist that the want of affirmative consent by them or their trustee could paralyze the arm of the court in the discharge of its duty."

This plainly shows that the court did not, in the main rely upon the principles in support of Meyer vs. Johnson which it laid down, but upon the fact that the mortgage lien had become enforceable and the trustee and bondholders instead of proceeding to enforce it, "willfully stood aloof," as the court said on page 464, with the road openly in charge of the receiver, who was acting under the orders authorizing certificates to be issued, and under which rights were being acquired by third parties. It certainly requires no argument to show that "consent" was not necessary under such circumstances, as the trustee and bondholders were justly estopped from

urging objections to the orders which should have been made before.

The reporter takes this same view of the opinion in this case. In the Syllabus it is said: "It was not necessary to have the consent of the bondholders to create a lien prior to the bonds on the corpus of the property, on the facts of this case, and in view of the neglect of their trustee to interpose all the while the road was openly in the charge of the receiver, and being run, with the interest on the bonds in arrear."

The court in *Union Trust Co. vs. Ill. Midland Co.* cites the case of *Hoover vs. Montclair, etc., Ry. Co.* (1), as sanctioning its own strong language and as being in line with *Meyer vs. Johnson*. In *Hoover vs. Montclair Ry. Co.* the road in the hands of the receiver was badly in need of repairs and could not be operated with safety to the traveling public. The court after showing its authority, derived from a statute to direct the continued operations of an insolvent road in a receiver's hands, and that the encumbrancers had taken their encumbrances since the act, said: "The power to make the repairs, however, does not depend on these circumstances, nor on the statute. The first mortgagees are represented before me by counsel who represent also a very large proportion in number and amount of the second mortgage bondholders. The parties represented by him are desirous that the authority which the receiver seeks be given to him. The trustees of all the mortgage bondholders have been notified of this application, and they are represented before me, and are desirous that it be granted." The court then authorizes the order. Instead of supporting *Meyer vs. Johnson* and the language used in *Union Trust Company*

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(1). 29 N. J. Eq. 4.

vs. Ill. Midland Co., this case clearly shows that the chancellor considered that he derived his authority to issue first lien certificates from the consent of the parties in interest.

Langdon vs. Ry. Co. (1) is a remarkable illustration of the abuses to which railroad receiverships is liable. Receivers were in possession of the railroad property for a period of over thirty-one years, and during that time issued receivers' obligations to a very large amount which were upheld, but only upon the ground that they had been issued with the knowledge and assent of all the parties interested in the subject matter of the receivership.

The case of Humphreys vs. Allen (2) is sometimes cited as supporting Meyer vs. Johnson. A quotation from the opinion shows that it does not do so. "Whatever may be said as to the limitations which the law places upon the exercise of the power of the chancellor to make certificates issued by a receiver for moneys borrowed by him, a lien upon the property, superior to the vested lien of the mortgagees, in this case we think that appellants are not in a position to raise the question. Whether the subject matter to which these certificates were applied comes within the scope of the powers of the court in the preservation of the property for the benefit of all concerned, was a question which might have been raised, and ought properly to have been raised, before the certificates were issued and sold. It was incumbent upon him, if he intended to insist that these certificates should not be a paramount lien upon the property of the company, that he should have intervened and raised his objections. On the contrary, with a full knowledge of all

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(1). 53 Vt. 228.

(2). 101 Ill. 490.

the facts, he lay by and permitted others in good faith to invest their money in these certificates, and the money to be applied for his benefit in discharging the liabilities of the company for services and supplies, and for a debt by which the rolling stock of the company in which he was interested was tied up. In a court of equity he could not be heard afterwards to claim that the holders of these certificates should not have this priority." No comments are necessary to show that this case does not affirm the doctrine of *Meyer vs. Johnson*. This case also contains a strong dissenting opinion denying a court the right to borrow money and make it a first lien on property in preference to established ones.

The doctrine of *Meyer vs. Johnson* has met with decided opposition in several jurisdictions. Thus in *Credit Co. vs. Arkansas, etc., R. Co.* (1), where an order had been made authorizing the issue of certificates for necessary repairs and improvements, and afterwards a change in the United States district was made by which the territory in which the railroad was located was transferred to Caldwell's J., district and the order was rescinded. Caldwell, J., in speaking of the rescision of the order used the following language: "The rescinding order was not made because the road did not stand in need of repairs. It was notoriously true that its condition was such as to make it dangerous to life and property to run cars over it; ties were rotten, iron worn out, etc. It seems to be settled that a court of equity has the power in this class of cases to authorize its receiver to issue certificates of indebtedness, and make them a first lien upon the road for the purpose of raising funds to make necessary repairs and improvements." He then cites *Wallace vs.*

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(1). 15 Fed. Rep. 46.

Loomis and Stanton vs. Ala., etc. R. Co., but as we have seen the order in those cases was made at the request and with the consent of the parties interested. He then continues: "But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not unfrequently results in taking from them the security they already have and appropriating it to pay debts contracted by the court.

This court has uniformly refused to arm its receivers with such a dangerous power. When the road cannot be kept running without its exercise, except to a very limited extent, the safe and sound practice is to discharge the receiver or stop running the road and speed the foreclosure." He then cites *Paine vs. Little Rock, etc., R. Co.*, where an application was made to complete a line of road and issue certificates for that purpose, in order to save a valuable land grant and comments upon it by saying that the order was refused upon the ground that it was no part of the duty of a court of chancery to build railroads and that the assent of all parties interested in the property could not make it such and that there was no difference between building a railroad and making extensive and general repairs and betterments. That in that case a plan of reorganization was decreed which the United States Supreme Court approved and said that it "was a much more desirable plan" than to issue receiver's certificates (1).

Another case which strongly opposes the doctrine that certificates may be authorized as in *Meyer vs. Johnson*, in opposition to the wishes of lien creditors, is *Investment Co. vs. Ohio, etc., R. Co.* (2). The court said: "If

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(1). *Shaw v. Railroad Co.*, 100 U. S. 612.

(2). 36 Fed. Rep. 48.

the court authorizes certificates to be issued and made a lien upon the railroad superior to the mortgages for the purchase and laying of steel rails, for the purchase of equipment and for the completion of the road, the result may be to cause these things to be done at the expense and to the detriment of the bond and lien holders and for the benefit of the purchasers, for it rarely occurs that improvements and betterments add to the salable value of the road anything near their cost. In this case the court cannot say that they would at all increase the bids at the sale, which, in the condition of the railroad company and of the road, is the proper test."

The court then explaining that a majority of the bondholders having filed consents and expressed their desire that the certificates be authorized, said he was willing to give the order but that the certificates should not be a charge upon the interest or affect the lien of the non-consenting bond and lien holders. But the court reserved to the consenting bondholders the right to enlarge the order so as to charge also the non-consenting bond and lien holders, if it was made clear to the court that the salable value of the road is so increased by the improvements and betterments as to make it equitable to require the non-consenting bond and lien holders to pay their ratable proportion of the cost.

The test as suggested by the court is beyond doubt the only one that can be properly set up as the guide of a court in authorizing certificates when the lienholders object, and that is that they should never be authorized, when the lienholders object, unless it was certain that the salable value of the road would be increased. In such a case the lien holders would be estopped from complaining for they would have sustained no injury. The

courts of New York are also opposed to the doctrine of *Meyer vs. Johnson*, as is shown in the case of *Raht vs. Attrell* (1), where certificates had been authorized for the operation and completion of a hotel, but the priority accorded them was not allowed on appeal, this court saying that it could not be done without the consent of lien creditors; and also in *Met. Trust Co. vs. R. R. Co.* (2), where an application for receiver's certificates for workmen's claims accruing prior to the receivership, and for supplies in operating the road were refused.

Upon the whole the decision of *Meyer vs. Johnston* stands alone, for, although sanctioned by strong language in *Wallace vs. Loomis*, *Barton vs. Barbour*, *Miltenberg vs. Loganport*, etc., *R. Co. and Union Trust Co. vs. Illinois Midland Co.*, yet the decisions in those cases could have been and in reality were, founded upon other reasons which the court took great pains to point out and which were sufficient in themselves.

The principal reason given in these cases is that the public retain an interest in the railroads which must be protected even at the expense of those holding liens founded upon most solemn contracts. "Consent is desirable but it is seldom practicable when the debt exceed the value of the property," said Justice Blatchford in the last case. This shows that where such is the case the security of the lien creditors will be further reduced by certificates in order that the public may not suffer an apprehended evil. An unanswerable argument to this is that if the security of lien creditors is to be taken away for the use or benefit of the public, the public ought to render compensation for such taking.

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(1). 106 N. Y. 423.

(2). 103 N. Y. 245.



It may, no doubt, be said in favor of the power to authorize certificates that, if judiciously exercised, it would be beneficial to the interests of all concerned, but it may also as truly be said that when its exercise is really essential the parties in interest may be depended upon to give their consent. The history of the cases of *Wallace vs. Loomis*, *Hoover Ore Co.*, *Langdon vs. Montclair*, etc., vs. *R. R. Co.*, and others, are worthy instances to show that even in extreme cases where there are doubts as to whether the lien claims will ever be satisfied, the bond and other lien creditors may be depended upon to give their consent, upon it appearing that certificates are necessary.

Establish the rule that consent is necessary and you escape the danger of abuse at the hands of "rash and facile" chancellors to which the other rule is subject, and then, if the public rights are endangered and the duties owed to it by the railroad corporation not performed, those rights may be amply protected and enforced by quo warranto proceedings for forfeiture of its franchises just the same as could have been done if the property was still in the control of the corporation. And it being known that the duties owed to the public must still be performed while the road is in the possession of a receiver, the bond and other lien holders in defence of their own interests would assent to such certificates as would be necessary to enable the receiver to continue to perform the duties owed by the corporation to the public. By this method all the benefits of receivers' certificates would be secured without a sacrifice of rights of property and without unsettling the law of liens.

**FOR WHAT PURPOSES CERTIFICATES WILL BE ISSUED.**

As we have seen, the practice of issuing receivers' certificates is a development of the practice of allowing expenses incurred by a receiver in taking possession and holding property until the rights of parties in interest are determined. Receivers were generally empowered to make necessary repairs in order that the property might be preserved for the ones found entitled.

"Expenses for preservation" seems to have been the central thought in the minds of the judges when receivers' certificates were first introduced and is yet the guiding star in directing the minds of the courts in authorizing their issue. The courts seemingly all agreed that certificates should be issued only for the preservation of the property but as to what constitutes an expense of preservation has given rise to a great diversity of opinion. A too liberal construction as to what constitutes an expense of preservation has led to many abuses, and oftentimes certificates have been authorized for many purposes that could not reasonably be considered as expenses for preservation. For this reason the doctrine of receivers' certificates has met with considerable opposition.

Starting with the thought that a court should only incur expenses for the "preservation and protection" of property when in the hands of a receiver, let us see what expenses have been included within the meaning of those terms, as justifying the issue of receivers' certificates. In *Meyer vs. Johnson* (1), one of the earliest and best considered cases on this subject, the purpose for which certificates were issued were limited to putting the railroad

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(1). 53 Ala., 237.

and its appurtenances in repair, and for purchasing such rolling stock as would be absolutely necessary to keep up the road as a going concern. Had this case been more closely followed the many abuses that have marked the development of this doctrine would have been avoided, although certificates for such purposes, if issued without consent of lien holders, are not free from objections (1). Yet, such a rule, if adhered to, is much better than that the courts should issue them for the purposes of improving or adding value to the property against the will of those interested in it.

The courts, however, in the different jurisdictions, have not adhered to the rule as formed in *Meyer vs. Johnson*. Thus, certificates have been authorized to replace earnings used, not for operating expenses but for betterments (2). To put road in repair and complete any uncompleted portions of the road and procure rolling stock, machinery and other things for operating the road (3). For the purpose of making improvements indispensable to the preservation of the property and to the profitable running of the road (4). To obtain money necessary for completing a canal in order to save a land grant (5).

Thus, upon an application for the appointment of a receiver who is to be authorized to borrow money sufficient to complete large extensions and issue certificates for the same in order to secure certain land grants which were the only security of any considerable value which the plaintiffs and bondholders had for their large advances,

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(1). See authority of courts to issue certificates, P. 45.

(2). *Union Trust Co. v. Ill. Midland Co.*, 117 U. S. 435.

(3). *Swann v. Wright*, 110 U. S. 590.

(4). *Turner v. R. R. Co.*, 95 Ill. 134.

(5). *Jerome v. McCarter*, 94 U. S. 134.

the court said: "That the exigencies of the case are such as under the circumstances to warrant the court, upon the application of the parties chiefly interested, to appoint a receiver and to clothe him with the powers desired" (1).

They have been authorized for the building, completing and equipping the unfinished portions of a division (2).

The most startling instance illustrating the farthest boundary line to which courts have gone in authorizing the issue of certificates is shown in the case of *Bank of Montreal vs. R. R. Co.* (3). In that case the receiver was authorized to complete and build all the unconstructed portions of a railroad amounting to over sixty miles, and for the money necessary was authorized to issue certificates which were to be a first lien in the road. This is an instance where the court really entered into a speculative experiment, for there was no land grant which would be lost if the road was not finished within a certain period, nor was it clearly shown that the security of the lien holders would be enhanced.

The better practice would seem to be the one adopted in *Meyer vs. Johnson*, where such certificates to enlarge and complete the work beyond what was necessary for the work beyond what was necessary for the preservation of the property were not approved. The court declaring that it was not the business of a court of equity to enter into the speculative project of building or completing a railroad (4).

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(1). *Kennedy v. R. R. Co.*, 2 Dill. 448.

(2). *Smith v. McCullough*, 104 U. S. 290.

(3). 48 Ia. 518.

(4). 53 Ala. 237.

Nor have the courts uniformly authorized the issue of certificates even to save a land grant which was the lien holders principal security. Thus, it has been held that a court of equity should never enter upon the business of building a railroad unless there was an overwhelming and irresistible necessity and the saving of the land grant did not present such a necessity and certificates were refused (1). The court in that case suggested a commendable plan which is worthy of consideration, not only in cases where certificates are desired for building purposes but also for other purposes. The court said: "That what is was willing to authorize the receiver to do was out of moneys to be furnished him by the parties in interest and not otherwise, to proceed to construct and equip the unfinished portions of the road at the lowest cost in cash and the money so furnished was to be a first lien upon the road.

Upon an application to authorize a receiver to issue certificates which were to be a first lien, so as to build sixty miles of road in order to earn a large and valuable land grant which would lapse in a short time unless the road was completed, and, although a majority in value of the first mortgage bondholders concerned in the application, the order was refused upon the ground that it was no part of the duty of a court of chancery to build railroads and that the assent of all the parties interested in the property could not make it so, and that there is no difference, so far as relates to this question, between building a railroad and making extensive and general repairs and betterments, the cost of which sometimes approximates the cost of original construction (2). The

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(1). *Kennedy v. R. R. Co.*, 5 Dill. 519.

(2). *Credit Co. v. Ark. etc. R. R. Co.*, 15 Fed. Rep. 46.

court, however, allowed the parties to reorganize the company and allot stock to the lien holders for their liens and by the execution of another large mortgage and sale of bonds raise a sufficient amount to complete the road. This plan was approved by the Supreme Court of the United States, that court saying that it was a much more desirable plan than the issue of receivers' certificates (1).

Thus, upon a petition of a majority of the bond holders for certificates to raise money to make a final payment on a valuable tract of land, and to make an additional advantageous connection, and to purchase rolling stock for which an exorbitant rent is being paid, the certificates were allowed but not to be a charge upon the interest or affect the lien of the non-consenting bond or lien holders, but with the right to enlarge the order so as to affect the non-consenting bond and lien holders if it was clearly shown that the salable value of the road was increased by the improvements and betterments (2).

When vendors of land to a railroad company retained a lien under agreement of sale, certificates were authorized to be issued to prevent the sale of the entire road. The State Court of Ohio had decreed the sale of the entire road, although the lien did not embrace the whole road, but even if the decree of sale was erroneous it could not be attacked collaterally in the United States courts (3).

Where a division was not under mortgage but the company had a claim upon it and it was a link necessary in the continuous line of road, certificates were ordered to be issued to various parties who claimed to be subcontractors for building the division and who were about

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(1). *Shaw v. R. R. Co.*, 100 U. S. 605.

(2). *Investment Co. v. R. R. Co.*, 36 Fed. Rep. 48.

(3). *Union Trust Co. v. Seasingwood*, 130 U. S. 483.

to sell certain shares of the stock of the company that owned the division and which were held in pledge for the debts. It was held that the certificates were properly issued (1).

They have been issued for the purchase of equipments and additions and improvements upon the property (2). For the payment of taxes, or to discharge tax liens (3). To pay indebtedness for services, supplies, rentals and for the payment of money borrowed and expended in repairs and improvements of the road and secured by a chattel mortgage upon the company's rolling stock (4). To make up a deficiency in operating expenses and to pay antecedent debts accruing three months prior to the appointment of a receiver (5). But as to this, see *Met. Trust Co. vs. Ry. Co.* (6). To pay accruing rents and other necessary charges and to make payments of all sums due or maturing for materials or supplies and to employees within five months previous to the appointment of receivers (7). However, certificates directed to be issued for wages due and to become due, did not authorize their issue to pay orders drawn upon a mercantile firm to employees and honored by the firm, as such a claim was simply a store account and not one for wages (8). They will not be authorized for the purpose of raising money to enable the receiver to continue to pay interest to bond holders (9). But as to this, see *Fidelity, etc., Co. vs. Iron Co.* (10).

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(1). *Kneeland v. Luce*, 141 U. S. 491.

(2). *Langdon v. R. R. Co.*, 53 Vt. 223.

(3). *Union Trust Co. v. Ill. Midland Co.*, 117 U. S. 435.

(4). *Humphreys v. Allen*, 101 Ill. 490.

(5). *U. S. Trust Co. v. R. R. Co.*, 25 Fed. Rep. 800.

(6). 103 N. Y. 245.

(7). *Taylor v. Philadelphia and R. R. Co.*, 7 Fed. Rep. 377.

(8). *Fidelity, etc. Co. v. Iron Co.*, 42 Fed. Rep. 372.

(9). *Taylor v. Phila. etc. R. Co.*, 9 Fed. Rep. 1.

(10). 42 Fed. Rep. 372.

An order authorizing the issue of certificates for expenses of operation did not authorize their issue to trustees of bond holders for claims of services before the foreclosure suit was begun (1). They should not be issued to pay the stipulated rent for locomotives under a lease entered into by a railroad company when the agreement was an improvident one and the rent reserved was more than a just compensation for the use of the engines (2). They will not be allowed for unpaid vouchers for claims that are not liens in favor of regular shippers whose good will is valuable without the consent of all the bond and lien holders. Nor will they be authorized for the services and expenses of the president of the railroad company (3).

The doctrine of receivers' certificates is confined to railroad enterprises. Thus, they should not be issued to raise money to complete, furnish and operate a hotel nor to pay employes who, threatening to burn the hotel if their wages in arrear were not paid. The court holding that money advanced for that purpose did not create a debt for preservation, which may be preferred to the claim of the bond holders, as it was the duty of the State to suppress such an apprehended disturbance (4). Thus, an application made by a receiver of a coal company to issue receivers' certificates to raise money to pay taxes and to continue the operation of the mine, the application was refused on the ground that the doctrine of receivers' certificates did not apply to other than railroad corporations (5). They have been authorized, however,

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(1). *Stanton v. Alla. etc. R. R. Co.*, 31 Fed. Rep. 585.

(2). *Coe v. R. R. Co.*, 27 N. J. Eq. 37.

(3). *Investment Co. v. R. R. Co.*, 36 Fed. Rep. 48.

(4). *Raht v. Attrell*, 106 N. Y. 423.

(5). *Farmers etc. Trust Co. v. Coal Co.*, 50 Fed. Rep. 401.



for the purpose of completing vessels of a ship building corporation in the hands of a receiver (1).

**WHO MAY CONTEST RECEIVERS' CERTIFICATES.**

It may be stated generally that only those persons having an interest in the property which is pledged for the payment of certificates, can raise the question as to their validity or otherwise resist the application of the property to their payment. The question then is raised, who are the parties having such an interest in the property as would entitle them to dispute the certificates and whether or not such privilege can always be exercised. As receivers' certificates are given a priority over all other liens it would seem that those holding liens prior in time would be the ones most deeply interested in resisting the lien of certificates and so most of the actions where such certificates are questioned are contested at the instance of prior lien holders. As the railroad company is interested in the surplus, after payment of mortgage and other debts, it would seem that it would also have the right to question the validity of certificates, but as a surplus is a very rare occurrence, objections by the company are seldom made. The sale is sometimes ordered before the outstanding certificates are due or determined and the certificates are left as a lien upon the property.

In such case the purchaser has an interest in the determination of what certificates are to be charged against the property. It would seem also that the general unsecured creditors of the company would have the right to object to the preference given to certificates over their claims. However, these parties may, by their ac-

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(1). Appeal of Neafie, 12 At. Rep. (Pa.) 271.

tions, be estopped from objecting to receivers' certificates and the question then is at what times may they contest and at what times are they estopped from attacking them.

Where property owners brought an action to restrain the defendants from constructing an elevated road and among the grounds urged why the construction should be enjoined was the invalidity of receivers' certificates authorized to raise funds for such construction, it was held that complainants were not concerned in the validity of the certificates; that it was a question for those only who propose to advance on such certificates and those who are interested in the property (1). As the preference due to liens prior in time is affected when receiver's certificates are issued, such prior lien holders are entitled to notice that an application is to be made for authority to issue them, so that they may have an opportunity of resisting such applications.

When such notice is not given, the prior lien holders become entitled upon the plainest principles of justice and equity to contest the necessity, validity, effect and amount of such certificates as fully as if such questions were then for the first time presented for determination (2).

Such notice, in order to be binding upon lien holders, must be given in time to afford them an opportunity to investigate the necessity of issuing certificates and to consult counsel as to laws relating to them. Thus, where notice was given of an application for an order to issue certificates only a few hours before the order was granted, the bondholders contested the validity of such

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(1). *Moran v. Lydecker*, 11 Abb. No. C. 298.

(2). *Union Trust Co. v. Ill. Midland Co.*, 117 U. S. 438.

order on the ground of insufficient notice and the order was set aside (1).

Mortgage bond holders are entitled to notice, but if the trustees of their mortgage were made parties, the bond holders were represented by them unless it was shown that the trustees did not fairly represent them; they are bound by the notice to the trustees and could not afterwards object to certificates on the ground that they were not notified of the application for the order to issue them (2).

Lien holders of corporations other than railroad corporations have the right to object to the issue of certificates or the allowance of priority of unsecured claims, and they may contest their validity and priority after their issue whether they had notice or not of an application for an order, for the doctrine of receivers' certificates is confined to railroad corporations (3).

However, certificates were issued by a receiver of a ship building corporation and the priority of such certificates was upheld, but they were issued with the consent of the bond holders (4).

Where the parties in interest consent to the issue of receiver's certificates they will afterwards be estopped from disputing the validity or priority of certificates properly issued. Thus, it was held in *Langdon vs. Ry. Co.* (5) that when persons act as receivers and managers and issue negotiable obligations as such, with the knowledge and assent of all the parties interested in the sub-

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(1). *Ex parte Mitchell*, 12 S. C. 83.

(2). *Wallace v. Loomis*, 97 U. S. 146.

(3). *Raht v. Attrell*, 106 N. Y. 423; *Seventh Nat. Bank v. Iron Co.*, 35 Fed. Rep. 436; *Wood v. Guarant. Trust Co.*, 128 U. S. 416.

(4). *Appeal of Neafie*, 12 At. Rep. (Pa.) 271.

(5). 53 Vt. 228, also *Ver. & Con. R. R. v. Ver. Cent. R. R. Co.*, 50 Vt. 500.

ject matter of the receivership, as against bona fide holders of such obligations, such parties are estopped to deny that they are just what they purport to be, namely, the obligations of receivers and managers and as such entitled to priority of payment from the assets of the trust.

The trustees of the mortgage generally represent the bond holders in conducting foreclosure proceedings, but the bond holders or some of them for all, may institute the proceedings without making the trustees or other bond holders parties. In such case the proceedings are only binding upon the bondholders when they are fairly represented. Thus, where some of the bondholders filed a bill and had a receiver appointed who issued certificates, and upon a bill brought by other bond holders, it being found that they were not fairly represented, or the proceedings not fairly conducted, they were entitled to relief the same as if no action had ever been brought. Nor were they bound by the receiver's certificates as they were not parties to the proceedings (1).

Consent given by the trustee of a mortgage may estop the bond holders from contesting certificates. As, where a receiver was appointed at the instance of judgment creditors, and the mortgage trustees were made parties, and consented to the issue of certificates, it was held that the certificates bound every bond holder, as there was nothing to show that the trustees acted corruptly or fraudulently (2).

Where the trustees consented to the order and the bond holders knew of the order but did not intervene before issue, the question whether the subject matter to which the certificates were applied comes within the

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(1) *Stevens v. Union Trust Co.*, 57 Hun. 498.

(1). *Kneeland v. Luce*, 141 U. S. 491; *Central Trust Co. v. Seasonwood*, 130 U. S. 483.

scope of the powers of the court in the preservation of the property for the benefit of all concerned, was a question which might have been raised and ought properly to have been raised before the certificates were issued and sold (1).

Where a receiver was appointed at the instance of second mortgage bond holders and was authorized to complete a portion of road and build a bridge and charge the expenditures for such upon the road as a first lien, it was held that first mortgage bond holders could not afterwards object as they lay by and saw the court and receiver dealing with the property in the manner complained of, and contented themselves with merely protesting generally and disclaiming all interest under the receivership, for that a court of equity, however it might act on the question of original authority or discretion, if presented in season and under circumstances of good faith, will not visit upon innocent parties dealing with a receiver within the authority of its orders, consequences which result from the inequitable negligence and supineness of a party to the suit or of those represented by him (2).

Before any proceedings are instituted by the bond holders to make their securities available, they may exercise such control over the property and may so request and sanction the act of a third party in advancing money for the benefit of the property, so as to estop them from setting up their mortgage as a lien paramount to the claims of one who thus acted on the faith of their request or direction, but to create such an estop-

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(1). *Humphreys v. Allen*, 101 Ill. 490.

(2). *Milttenberger v. Logansport R. R. Co.*, 106 U. S. 286.

pel a plain and undoubted case should be made. It is not sufficient to say that some of the bond holders, or a majority of them, or such as have been most active and influential in promoting the concerns of the road, have done acts which, as to them, creates a superior equity in favor of a third party who has made advances. For, in such case the transaction would have to be regarded as one between individual bond holders, and such third party. The mortgage lien as an entirety can only yield to such equitable claim when acts have been done which bind all the bond holders because directed and sanctioned by all. It is not enough to say that the money for which he seeks reimbursement has gone into the road and that the bond holders have been benefited thereby but must be shown some affirmative acts in behalf of all the bond holders in order to create such an estoppel (1).

When, according to agreement of the parties, instead of having a sale, the property was transferred to another company for a certain rent, and claims of other creditors were filed, it was held that such claims could not be disputed by the bond holders because they were parties to an arrangement by which the property was disposed of without sale and, therefore, deprived the creditors of an opportunity of being paid out of a surplus which might have arisen under a sale, because the property was transferred leaving the defendant company without means of paying its debts, and the bond holders also received a new security (2).

While the railroad company, whose mortgage is being foreclosed, may object to the issue of certificates and may contest the validity of certificates not authorized to

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(1). *Kelly v. Ry. Co.*, 10 Biss. 151.

(2). *Farmers etc. Trust Co. v. Ry. Co.*, 19 Fed. Rep. 214.

be issued, yet they can not be heard to object to the priority of lien given certificates, for if the certificates are liens at all it makes no difference to the company what priority was given them for they can get nothing until all liens are paid. Nor where the railroad company assigned in bankruptcy, the assignee could not object to the decree giving priority of lien to certificates (1). Those holding mechanics' liens have the same right to contest the validity of receivers' certificates as mortgage creditors. Thus, where a mechanic's lien was established against a railroad and afterwards during a foreclosure proceeding, a receiver was appointed with power to issue certificates for large amounts, which were declared to be paramount to the liens of all other parties; the road was sold to satisfy the certificates but the holder of the mechanic's lien had not been made a party to the action in which the receiver was appointed and the order made nor to the foreclosure of the certificates. It was held that he could not be divested of his lien by any judicial proceeding to which he is not a party, nor did the receiver represent him. The court said, "We are asked to go much further than any court has gone yet, so far as we are able to discover. We are asked to hold that a lien may be displaced by an order made in a proceeding to which the lien holder was not a party, and that, too, notwithstanding the value of the lien may be wholly destroyed and without any showing that any exigency existed which called for the exercise of such power" (2). Whether or not the purchaser of a railroad sold by a receiver can question the validity of receiver's certificates which are attempted to be charged upon the

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(1). *Jerome v. McCarter*, 94 U. S. 134.

(2). *Snow v. Winslow*, 53 Ia. 201.

property purchased depends upon the terms of the decree of sale and deed to the purchaser, and the understanding of the parties at the time. Thus, where the property was sold and purchased with the clear understanding and agreement that the valid outstanding receiver's certificates constituted a prior lien which the purchasers assumed and undertook to pay, the purchasers are estopped from contesting the validity of such certificates (1).

A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase. He has, however, a right to be heard on all questions thereafter arising affecting his bid which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by the decree, where not concluded by the terms of the decree, the allowance of intervening claims subsequently allowed is a matter affecting the interests of a purchaser (2). Where certificates were issued upon orders made without notice or knowledge of parties interested and the receiver misapplied the money thus raised and afterwards a sale was made to a committee of bond holders who paid in mostly in bonds, and upon the certificate holders filing their claim it was held that certificates taken as these were, are taken at the risk of final action of the court but that the order stands until set aside. The court had jurisdiction of the res. and the certificates were ordered for a purpose authorized by law, under the order of the court they became a valid first lien upon the railroad. It could not be claimed that the lien was transferred to the

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(1). *Central Trust Co. v. Ry. Co.*, 44 Fed. Rep. 526.

(2). *Kneeland v. American Loan Co.*, 136 U. S. 89.



fund as the purchaser did not pay the purchase money in cash. The lien was preserved by recitals in the deed having all the force of covenants running with the land and binding any one who should acquire the title (1).

In *Swain vs. Wright* (2) the order of sale provided that it should be subject to liens of receiver's certificates then pending on reference, and that the title was to be conveyed subject to such certificates. Afterwards, the report on the reference sustained the certificates. It was held that the purchaser could not have the claims on the certificates re-submitted nor could he be allowed to file exceptions to the report. The court said: "The claim of the purchaser of the property to reopen the litigation to which he was not a party and which related to liens expressly subject to which the property was sold, purchased and conveyed and which liens were fully examined upon issues between and notice to those who, at the time the decree of sale was rendered, were alone interested in their recognition or rejection, does not seem to rest upon any foundation or equity." And this, even on the ground of fraud alleged to have been discovered after confirmation of the master's report (3). The estoppel also applied to the grantees of such purchasers upon the principle that every grantee is estopped by the judgment against his grantor, because he holds by a derivative title from such grantor (4).

The creditors, lien or otherwise are estopped from objecting to an allowance made by the receiver in order to secure positive benefits to the property in which they are interested, and which has that effect (4).

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(1). *Mercantile Trust Co. v. R. R. Co.*, 50 Fed. Rep. 874.

(2). 110 U. S. 590, also *W. Swain v. Clark*, 110 U. S. 602.

(3). *Central Nat. Bank*, 1 Hazard, 30 Fed. Rep. 484.

(4). *Cowdrey v. Rey Co.*, 1 Woods, 331.

**THE RIGHTS OF LIEN CREDITORS UPON AN APPLICATION FOR AN ORDER TO ISSUE RECEIVERS' CERTIFICATES.**

In many of the cases where receivers' certificates have been authorized by the court the application has been made on behalf and with the consent of the parties who hold liens which will be displaced by the lien of the certificates. Those persons who thus ask for and consent to the issue of certificates should not and can not be heard to object to the priority given the certificates that are properly issued under the authority of the court in this manner obtained. While there may be objections to a court, either with or without the consent of the parties in interest, pledging its faith, that property which it has taken into possession will be applied to the payment of such obligations of its receivers, still the ones who invoke the exercise of this extraordinary power should not be heard to offer such objections.

As the courts have been recognized as possessing the power to issue certificates without the consent and even against the objections of those holding liens the priority of which would be transferred to the certificates, the consideration of what rights the lien holders have upon an application to issue them, is of great importance to those holding liens upon railroad property or those intending to invest in such securities.

One of the rights to which bond holders are entitled is notice that the application is to be made to the court. They should not be issued except after full notice to the parties interested, when this can be given and ample opportunity for them to be heard when the application is taken up by the court (1).

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(1). Meyer v. Johnson, 53 Ala. 237.

Sufficient opportunity should be given to parties in interest either to investigate the facts alleged in the reports of the receiver or to examine the law applicable to the case, or opportunity given to the attorneys in the cause to consult with their clients as to the advisability of the order.

Thus, where an order was made after a reference for a few hours, it was held that the order was improperly granted. That orders of that class can only be made on motion and after a proper investigation and hearing (1).

That the parties in interest might be fully aware of the import of the application, a detailed statement ought to be made out specifying the sums needed and for what they are needed and clear proof adduced of the correctness of the statement and of the necessity that the money be raised (2).

The proper mode of objecting to an order authorizing the issue of certificates when made without notice to some of the parties is by application to the chancellor to vacate and set it aside (3).

All parties in interest are entitled to notice but notice to some of the parties sometimes dispenses with notice to others. Thus, bond holders are entitled to notice, but if the trustees of their mortgage were made parties the bond holders were represented by them and bound by the notice to them (4).

Thus, also, the consent of the trustees to the issue of the certificates would bind every bond holder if there

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(1). *Ex parte Mitchell*, 12 S. C. 83.

(2). *Meyer v. Johnson*, 53 Ala. 237.

(3). *Meyer v. Johnson*, 53 Ala. 237.

(4). *Wallace v. Loomis*, 97 U. S. 146.

is nothing to show that the trustees acted corruptly or fraudulently (1).

It would be inequitable to allow the bond holders to raise any question as to the validity of certificates which were agreed to by their trustees and were binding upon them (2.)

The bond holders might also be represented by one or more of their number, but in order to bind the non-acting bond holders, acting ones would have to fairly represent them. Then, where a foreclosure proceeding was instituted by two of the bondholders in the behalf of all but only one of the two, and neither the trustees or other bond holders were called in, it was held that as to certificates applied for and issued the other bond holders were not bound. The court saying: "They can not be bound without a violation of constitutional protection. The court acquires jurisdiction of the parties and of the subject matter before it, but from the nature of the case can only acquire jurisdiction of so much of the subject matter as all the parties before it hold. In railroad cases the courts have gone further than in other cases in displacing prior liens in order to preserve and operate the railroad, but only as between parties to the action, active or constructive. They can create no lien against the persons not such parties and can displace none" (3).

Where the holder of mechanic's liens was not made a party to the action in which the receiver was appointed and in which the order was made for the issue of certificates, nor to the foreclosure of the certificate, it was held that he could not be divested of his lien by a judi-

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(1). *Kneeland v. Luce*, 141 U. S. 491.

(2). *Central Trust Co. v. Seasingwood*, 130 U. S. 483.

(3). *Stevens v. Union Trust Co.*, 57 Hun. 498, *Mechanic's*.

cial proceeding to which he was not a party and that the receiver did not represent him (1).

One of the most authoritative opinions upon the rights of lien creditors is given in *Union Trust Co. vs. Illinois Midland Co.* (2). In that case it was said: "Those who take receiver's certificates must be deemed to have taken them subject to the rights of parties who have prior liens upon the property and who have not but should have been brought before the court."

While the court, under some circumstances and for some purposes, and in advance of the prior lien holders being made parties, may have jurisdiction to charge the property with the amount of receivers' certificates issued by its authority, it can not, without giving such parties their day in court, deprive them of their priority of lien. When such lien holders are brought before the court they become entitled, upon the plainest principles of justice and equity to contest the necessity, validity, effect and amount of all such certificates as fully as if such questions were then for the first time presented for determination. If it appears that they ought not to have been made a charge upon the property superior to the lien created by the mortgages, then the contract rights of the prior lien holder must be protected. If, on the other hand, it appears that the court did what ought to of the prior lien holder must be protected. If, on the have been done, even had the trustee and the bond holders been before it when the certificates were authorized to be issued the property should not be relieved from the charge made upon it in good faith for its protection and preservation.

It may be the duty to make such repairs as are neces-

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(1). *Snow v. Winslow*, 54 Iowa 201.

(2). 117 U. S. 435.

sary to keep the road and its structures in a safe and proper condition to serve the public. Its power to do this does not depend on consent nor on prior notice. Consent is desirable but it is seldom practicable where the debts exceed the value of the property. Though prior notice to persons interested by notifying them as parties, first requiring them to be made parties if they were not, is generally the better way, yet many circumstances may be judicially equivalent to prior notice. A full opportunity as in this case, to be heard on evidence, as to the priority of the expenditures and of making them a first lien is judicially equivalent. The receiver and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the laws. The court always retains control of the matter, its records are accessible to lenders and subsequent holders and the certificates are not negotiable instruments."

The lien holders should make their objections as soon as possible, and, if possible, before the certificates are issued. Thus, it was said in *Humphreys vs. Allen* (1): Whether the subject matter to which certificates were applied comes within the scope of the powers of the court in the preservation of property for the benefit of all concerned was a question which might have been raised and ought properly to have been raised, before the certificates were issued and sold." So that, where the trustees consented to the order and the bond holders knew of the order, they could not lay by and see the proceeds of the certificates applied for the benefit of

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(1). 101 Ill. 490.

the property and then afterwards raise objections to the validity of the certificates.

The same rights of lien holders are recognized in the cases of which *Fosdick vs. Schall* is the leading one (1).

Where it was said "It is not supposed that any such use of the income will be directed by the court without giving the parties in interest any opportunity to be heard against it."

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(1). 99 U. S. 235.





# TABLE OF CASES.

|                                                     |                                   |
|-----------------------------------------------------|-----------------------------------|
| Appeal of Neafe, . . . . .                          | 53, 55                            |
| Barton v. Barbour, . . . . .                        | 4, 6                              |
| Bank v. Hazard, . . . . .                           | 14, 16, 61                        |
| Bank of Montreal v. Ry. Co., . . . . .              | 18, 32, 48                        |
| Bank of Montreal v. Thayer, . . . . .               | 18, 19                            |
| Central Trust Co. v. Wabash, etc. R. Co., . . . . . | 8                                 |
| Central Trust Co. v. Seasongood, . . . . .          | 64                                |
| Central Trust Co. v. Ry. Co., . . . . .             | 60                                |
| Cowdrey v. Ry. Co., . . . . .                       | 61                                |
| Coe v. R. R. Co., . . . . .                         | 62                                |
| Credit Co. v. Ark. etc. R. Co., . . . . .           | 41, 49                            |
| Ex parte Mitchell, . . . . .                        | 55                                |
| Farmer's etc. Trust Co. v. Coal Co., . . . . .      | 52                                |
| Farmer's etc. Trust Co. v. Ry. Co., . . . . .       | 57                                |
| Fidelity Ins. etc. Co. v. Iron Co., . . . . .       | 10, 51                            |
| Fosdick v. Schall, . . . . .                        | 67                                |
| Hoover v. Montclair etc. R. Co., . . . . .          | 37, 39                            |
| Humphreys v. Allen, . . . . .                       | 40, 51, 57                        |
| Investment Co. v. Ohio etc. R. Co., . . . . .       | 42, 50, 52                        |
| Jerome v. McCarter, . . . . .                       | 46, 59                            |
| Kennedy v. St. Paul etc. R. Co., . . . . .          | 23, 48                            |
| Kennedy v. St. Paul etc. R. R. Co., . . . . .       | 32, 49                            |
| Kelly v. Ry. Co., . . . . .                         | 58                                |
| Kneeland v. American Loan Co., . . . . .            | 60                                |
| Kneeland v. Luce, . . . . .                         | 17, 50, 56, 64                    |
| Langden v. Ry. Co., . . . . .                       | 40, 50, 55                        |
| Loan & Trust Co. v. R. Co., . . . . .               | 12                                |
| Martin v. Somerville Co., . . . . .                 | 21                                |
| McCurdy v. Bowes, . . . . .                         | 14, 19, 20                        |
| Mercantile Trust Co. v. R. R. Co., . . . . .        | 12, 61                            |
| Met. Trust Co. v. R. R. Co., . . . . .              | 44, 51                            |
| Meyer v. Johnson, . . . . .                         | 9, 10, 14, 22, 24, 46, 48, 62, 63 |
| Moran v. Lydecker, . . . . .                        | 54                                |
| Milttenberger v. Logansport etc. R. Co., . . . . .  | 34, 57                            |
| Newbold v. Ry. Co., . . . . .                       | 13                                |
| Quincy etc. R. Co. v. Humphreys, . . . . .          | 8                                 |
| Raht v. Attrell, . . . . .                          | 44, 45                            |
| Sage v. Memphis, etc. R. Co., . . . . .             | 8                                 |
| Seventh Nat. Bank v. Iron Co., . . . . .            | 55                                |
| Shaw v. R. R. Co., . . . . .                        | 50                                |
| Shaw v. Bank, . . . . .                             | 13                                |
| Smith v. McCullough, . . . . .                      | 48                                |
| Snow v. Winslow, . . . . .                          | 32, 59, 65                        |
| Stanton v. Ala. etc. R. Co., . . . . .              | 11, 14, 15, 16, 30, 52            |
| Stevens v. Union Trust Co., . . . . .               | 56, 64                            |
| Swann v. Clark, . . . . .                           | 61                                |
| Swann v. Wright, . . . . .                          | 46, 61                            |
| Taylor v. Phila. etc. R. Co., . . . . .             | 51, 56                            |
| Tennessee v. R. Co., . . . . .                      | 11                                |
| Turner v. P. P. & S. R. Co., . . . . .              | 10, 11, 14, 15, 17, 46            |
| Union Trust Co. v. Ill. Midland Co., . . . . .      | 4, 16, 17, 36, 46, 51, 65         |
| Union Trust Co. v. Ry. Co., . . . . .               | 6, 8                              |
| Union Trust Co. v. Seasingword, . . . . .           | 50, 56                            |
| U. S. Trust Co. v. R. R. Co., . . . . .             | 51                                |
| Vermont etc. R. Co. v. Vt. etc. R. Co., . . . . .   | 9, 55                             |
| Wallace v. Loomis, . . . . .                        | 31, 34, 55, 63                    |
| Williamson v. Ry. Co., . . . . .                    | 6, 8                              |
| Wood v. Guarantee Trust Co., . . . . .              | 56                                |



# INDEX.

|                                                                                                                        | Page.      |
|------------------------------------------------------------------------------------------------------------------------|------------|
| <b>AMERICAN DOCTRINE.</b>                                                                                              |            |
| The management and operation of railroads by receivers is exclusively an, . . . . .                                    | 2          |
| <b>APPLICATION FOR RECEIVERS.</b>                                                                                      |            |
| Generally made by mortgage bondholders, . . . . .                                                                      | 8          |
| May be made by judgment creditors, . . . . .                                                                           | 8          |
| Or by mortgagor, . . . . .                                                                                             | 8          |
| Is addressed to the general discretion of the court, . . . . .                                                         | 6          |
| <b>APPOINTMENT OF RECEIVERS.</b>                                                                                       |            |
| Power of, rests in the discretion of the court, . . . . .                                                              | 6          |
| The subject of great abuse, . . . . .                                                                                  | 6, 7       |
| True rule as to, . . . . .                                                                                             | 7          |
| At whose instance invoked, . . . . .                                                                                   | 8          |
| At the instance of bondholders, . . . . .                                                                              | 8          |
| Mortgagee, . . . . .                                                                                                   | 8          |
| Judgment creditors, . . . . .                                                                                          | 8          |
| <b>ASSIGNMENT.</b>                                                                                                     |            |
| Of certificates must follow order of court, . . . . .                                                                  | 17         |
| <b>ASSIGNOR.</b>                                                                                                       |            |
| Of certificates not liable to assignee as a guarantor that the certificates will be paid, . . . . .                    | 20         |
| <b>CHANCERY.</b>                                                                                                       |            |
| Courts of, in some States have inherent power to place the operation of railroads in the hands of receivers, . . . . . | 2          |
| <b>CHARACTER.</b>                                                                                                      |            |
| Of receivers' certificates, . . . . .                                                                                  | 8          |
| <b>COMPLETION.</b>                                                                                                     |            |
| Of railroad by use of certificates not justifiable, . . . . .                                                          | 32         |
| <b>CONSENT</b>                                                                                                         |            |
| Of lien holders the only true authority courts of equity have to displace vested liens, . . . . .                      | 25, 31, 32 |
| <b>DEFENSES.</b>                                                                                                       |            |
| The same against bona fide transferees as the original holder, . . . . .                                               | 15, 16     |
| <b>DEFINITION.</b>                                                                                                     |            |
| Of receiver's certificate, . . . . .                                                                                   | 9          |
| <b>DISCRETION.</b>                                                                                                     |            |
| Of courts in appointing receivers, . . . . .                                                                           | 6          |
| <b>ESTOPPEL.</b>                                                                                                       |            |
| Principles of, seized upon to justify receivers' certificates, . . . . .                                               | 38, 40, 41 |
| <b>EXPENSES.</b>                                                                                                       |            |
| Of custody of property given priority over all claims, . . . . .                                                       | 8          |
| Incurred in preserving value of property given priority, . . . . .                                                     | 9          |
| <b>FORECLOSURE.</b>                                                                                                    |            |
| Without receiver, . . . . .                                                                                            | 8          |

|                                                                                                   | Page.  |
|---------------------------------------------------------------------------------------------------|--------|
| FORM.                                                                                             |        |
| Of certificates sometimes prescribed by court, . . . . .                                          | 11     |
| "GOING CONCERN."                                                                                  |        |
| Certificate allowed to keep the road as a, in order to preserve its value, . . . . .              | 33     |
| IMPROVEMENTS.                                                                                     |        |
| Certificates for, not justifiable, . . . . .                                                      | 26     |
| INTENT.                                                                                           |        |
| To defraud, necessary to hold receivers liable for excess of authority, . . . . .                 | 19     |
| INTEREST.                                                                                         |        |
| Is such as is authorized by the order of court, . . . . .                                         | 16     |
| JUDICIAL LEGISLATION.                                                                             |        |
| Receivers' certificates the result of, . . . . .                                                  | 7      |
| LIENS.                                                                                            |        |
| The law of, apparently violated by receivers' certificates, . . . .                               | 12     |
| LIEN.                                                                                             |        |
| Of certificates not enforceable, but duty of court to secure payment, .                           | 13     |
| Of prior incumbrances disturbed by receivers' certificates, . . . .                               | 12     |
| MEYER v. JOHNSON.                                                                                 |        |
| The leading case on the subject of receivers' certificates, . . . . .                             |        |
| MILLER, JUSTICE.                                                                                  |        |
| Criticism by, of above of appointing receivers, . . . . .                                         | 7      |
| MISTAKE.                                                                                          |        |
| Receivers not liable for honest mistake in excess of authority, . .                               | 19     |
| NEGOTIABILITY.                                                                                    |        |
| Receivers' certificates are not negotiable in the true sense of the word, . . . . .               | 13     |
| Negotiable in the sense that they may be transferred by indorsement, .                            | 13     |
| Courts of equity may make them fully negotiable, but this is questionable, . . . . .              | 14, 15 |
| NOTICE.                                                                                           |        |
| Holders chargeable with notice of want of authority in receivers to issue certificates, . . . . . | 11     |
| Of application for order to issue certificates must be given to parties in interest, . . . . .    | 62     |
| To trustees of mortgage is notice to bondholders, . . . . .                                       | 55     |
| If a few hours not sufficient, . . . . .                                                          | 63     |
| ORDER OF COURT.                                                                                   |        |
| Authorizing issue of certificates is strictly construed, . . . . .                                | 11     |
| As to time of payment is conclusive, . . . . .                                                    | 16     |
| As to rate of interest is conclusive. . . . .                                                     | 16     |
| ORIGIN.                                                                                           |        |
| Receivership of railroads of very recent, . . . . .                                               | 3      |
| PAYMENT.                                                                                          |        |
| Time of payment regulated by order of court, . . . . .                                            | 16     |

|                                                                                      | Page.  |
|--------------------------------------------------------------------------------------|--------|
| <b>POSSESSION</b>                                                                    |        |
| Of receivers, that of the court, . . . . .                                           | 3      |
| <b>PUBLIC.</b>                                                                       |        |
| Retains interest in railroads, . . . . .                                             | 5      |
| Of interest of the public as the justification of receivers' certificates, . . . . . | 28     |
| <b>PURCHASERS</b>                                                                    |        |
| Of receivers' certificates take subject to equities, . . . . .                       | 16, 17 |
| Are not bound to see to the application of the proceeds, . . . . .                   | 17     |
| May hold receivers liable for excess of authority, . . . . .                         | 19     |
| Can not hold their assignors, . . . . .                                              | 19     |
| <b>PURPOSES FOR WHICH CERTIFICATES ARE ISSUED.</b>                                   |        |
| To replace earnings used for improvements, . . . . .                                 | 46     |
| To make repairs, . . . . .                                                           | 46     |
| To complete unfinished road, . . . . .                                               | 46     |
| To purchase rolling stock, &c., . . . . .                                            | 46     |
| To pay taxes, . . . . .                                                              | 51     |
| To pay for supplies, rentals and services, . . . . .                                 | 51     |
| To pay money borrowed for and expended in repairs, . . . . .                         | 51     |
| To pay antecedent debts accruing three months prior to receivership, . . . . .       | 51     |
| To make up deficiency in operating expenses, . . . . .                               | 51     |
| <b>RECEIVERS.</b>                                                                    |        |
| Are officers of court, . . . . .                                                     | 18     |
| Exceeding their authority, liable for damages, . . . . .                             | 18     |
| Appointed by Courts of Equity, . . . . .                                             | 6      |
| True rule as to appointing, . . . . .                                                | 7      |
| <b>RECEIVERS' CERTIFICATES.</b>                                                      |        |
| Definition, . . . . .                                                                |        |
| Bind no one personally, . . . . .                                                    | 19     |
| No action can be maintained upon them by any one, . . . . .                          | 10     |
| Are only evidence of indebtedness, . . . . .                                         | 10     |
| Have no higher rights than the debts they represent, . . . . .                       | 10     |
| The doctrine confined to railroad enterprises, . . . . .                             | 52     |
| Will not be authorized for any other corporations than railroads, . . . . .          | 52     |
| Have been authorized to complete vessels of insolvent ship companies, . . . . .      | 52, 53 |
| <b>STATUTE.</b>                                                                      |        |
| Railroad receiverships authorized in some states by, . . . . .                       | 2      |
| <b>TRUE TEST.</b>                                                                    |        |
| Increase of salable. Value the true test for issuing certificates, . . . . .         | 43     |
| <b>TRUST.</b>                                                                        |        |
| Power to negotiate certificate is a personal, . . . . .                              | 16     |
| <b>VALIDITY.</b>                                                                     |        |
| Who may raise question as to, . . . . .                                              | 53     |
| The company, . . . . .                                                               | 53     |
| Prior claim at sale, . . . . .                                                       | 53     |
| Mechanic lien holders, . . . . .                                                     | 59     |
| General unsecured creditors, . . . . .                                               | 53     |
| All lien holders, . . . . .                                                          | 54, 55 |
| Question of validity should be raised before notice, . . . . .                       | 56, 57 |



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## NOTES.

The Queen's Bench Division of the English High Court has lately rendered a decision on the doctrine of "natural and probable consequences" which will be of general interest. The case is entitled *Halestrap vs. Gregory*, and is reported in L. R. (1895) 1 Q. B. 561. The facts are thus tersely stated by the reporter: "The plaintiff delivered to the defendant a mare to be agisted in a field which was separated by a wire fence from another field in the occupation of a cricket club. Owing, as was alleged, to the negligence of the defendant's servant in leaving open a gate between the two fields, the mare escaped from the field in which she was placed into the cricket field, whereupon certain members of the club endeavored in a careful and proper manner to drive her back through the gate. The mare refused to go through the gate and having run against the wire fence fell over it and was injured by one of the iron standards." On these facts, the county court judge held that the injury to the mare was not the natural and probable consequence of the negli-

gence of the defendant's servant in leaving open the gate. On appeal, this judgment was reversed, Wills, J., saying:

"It seems to me that if two adjoining fields are in the occupation of different owners, A and B, and A leaves the gate open between the two fields so that A's horse strays into B's field, it is only natural that B should drive it back again as quickly as possible, especially if, as here, the horse's presence in the field was likely to do serious damage. \* \* \* When so driven, the horse is likely to bolt and if there is a wire fence in the way to hurt itself. I think, therefore, that if the defendant's servant did in fact leave the gate open, the injury to the mare was the natural consequence of his doing so."



# THE QUIZ.

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(It is the general purpose of this department of the Pennsylvania Law Series to direct attention briefly to such changes as from time to time shall occur in the body of the law, either through new or different applications of the principles of the common law or by means of statutory enactments.)

It is intended to accomplish this, by means of a carefully prepared system of questions and answers; the questions, where practicable, being obtained from some leading specialist in that branch of the law in which the change occurs and the answers presenting the reason, as well as the substance of the change.—*Ed.*

**What is the Landlord's Right to Distrain for the Non-Payment of Rent ?**

**LEWIS D. VAIL.**

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**I.**

**Acts of Assembly of Pennsylvania.**

The first act passed in Pennsylvania in regard to distress was in 1729 in relation to the poor tax. In 1770, an act was passed but it was soon repealed and the Act of March 21st, 1772, was passed. Before the Act of 1772 the goods distrained could not be sold but were held by the landlord only as a pledge until the tenant either redeemed them by paying the rent due or regained them by an action of replevin, in which the landlord was made secure for any rent that might be coming to him. The most important sections of the Act of 1772 are as follows:

1. Provides that if the distress be not replevied within five days, the same shall be appraised and, after six days public notice, shall be sold. .

2. Provides a penalty for any pound, breach or rescue of the goods distrained.

3. Provides a penalty for distraining when no rent is in arrears.

5 and 6. Authorize the landlord to follow the goods and chattels clandestinely removed by the tenant, for thirty days after removal and (unless sold to a person not privy to the fraud) to distrain on and sell them.

7. Specifies some things which may be distrained and

sold. Also: The purchaser of the corn, grain, etc., shall have free egress and regress on the premises to mend the fences and to gather the crop.

14. Authorizes the landlord to distrain after the determination of the lease, provided the distress be made during the continuance of such lessor's title or interest. At common law distress could only be made during the term but by the terms of this section, it may be made at any time the rent is in arrears, providing the title to the premises be still in the party authorizing or making the distress.

The landlord's right to distrain after the termination of the term is without limitation as to time; the statute gives him this right whenever the rent is in arrear, and he retains the title. The landlord having the right to distrain, he is entitled to be paid the amount of rent in arrear, out of the proceeds of a sheriff's sale of goods found on the demised premises. (Moss's Appeal, 35 Pa. 162.)

The distress must be made in the daytime, between sunrise and sunset, after the rent is fully due—generally, the last minute of the last hour of the day on which the rent is payable—except in case of a clandestine or fraudulent removal of the goods after the rent is due, in which case the goods so removed may be distrained on, whenever found in the county, for thirty days after such removal, provided the same have not been sold for a valuable consideration, to an innocent purchaser, proving himself to be such. A removal if made at night is fraudulent, but a simple removal made in the daytime gives no presumption of fraud. The distraint must be made on the premises leased.

The day the rent is due it may be distrained for, and if

by stipulation in the lease, the rent is made payable in advance or on the day the tenant enters, the distress may be made the following day. (Berger vs. Fenstermacher, 2 Wharton, 95; Diller vs. Roberts, 13 S. & R., 60.)

A distress cannot be made after tender of the rent and a tender made after a distress will make the same void, but a tender made after the impounding would be otherwise, although replevin will lie until the day of sale.

To authorize distress there must be—

1. An actual demise and not a mere agreement to lease.

2. A rent either certain or capable of being reduced to a certainty by calculation. (Wells vs. Hornish, 3 Penrose & Watts, 30; Grier vs. Cowan, Addison, 347; Fry vs. Jones, 2 Rawle, 11.)

A sum of money payable periodically for the use of chattels is not rent in any legal sense of the word. It cannot be distrained for.

Rent must not only issue out of the land, but where a lease so mixes the real and personal property together that it cannot be determined how much of what is called the rent is to be paid for the chattels and how much is the profit of the land, there can be no distress for non-payment of it. (Commonwealth vs. Contner, 18 Pa. 439.)

In Pennsylvania a distress for non-payment of rent may be made by :

1. A lessor who has not parted with the reversion.
2. A tenant for life.
3. Joint tenants together.
4. A joint tenant who may appoint a bailiff to distrain without the assent of his fellow-tenant.
5. Coparceners where they all join.
6. Tenants in common together.

7. A tenant in common for his respective portion.
8. Surviving tenant in common for the whole rent.
9. A lessee who has underlet but not a lessee who has assigned unless he has expressly so provided in the assignment.
10. The executor or administrator of a decedent lessor for rent accrued and due prior to the death of the lessor.
11. A guardian for an infant.
12. The heir or devisee of a lessor for rent which has accrued, due subsequent to the death of the lessor.
13. A receiver appointed by the court.

Lord Hardwicke—"Receivers appointed by this court have the power, where they see it necessary, to distrain for rent and need not apply first to this court for a particular order for that purpose, and he often wondered at it, as it gave the tenant an opportunity for conveying his goods off the premises in the meantime, for the court never makes an immediate order for a distress, but allow on such applications a future day for a tenant to pay."

If there should be any doubt who had a legal right to the rent, then the receiver, as he must distrain in the name of the person who has that right, would very properly make an application to the court for an order. (Pitt vs. Snowden, 3 Atkyns, 750; Griffith vs. Griffith, 2 Vesey, 400; Hughes vs. Hughes, 3 Brown, 87.)

14. A husband, for rents accrued, due from his wife's land, during coverture, with the assent of the wife.

15. The agent or bailiff of the lessor may distrain on parol authority.

The law recognizes a verbal authority to distrain as of equal validity with a written one, noting, as the only ground of preference, that the latter is more easily

proved. What matters it to the tenant whether the agent's authority is in writing or by parol? It cannot affect any of his rights. Even a corporation may appoint a bailiff to distrain without deed or warrant. (*Franciscus vs. Reigart*, 4 Watts. 98; *Jones vs. Gundrim*, 3 W. & S., 531.)

At common law a mortgagee could distrain but such is not the case in Pennsylvania.

The mortgagee on notice becomes entitled to the rent of the premises mortgaged from the time of executing the conveyance in England. This is the common law rendering and result from the well settled principle that the estate of the mortgagee continues until forfeiture. The mortgagee, therefore, can distrain for rent in arrear. In Pennsylvania it is different. The mortgagee has no estate, property or interest in the land, until he takes possession and consequently has no right to distrain. (*Assignees of Myers vs. White*, 1 Rawle, 353.)

## II.

### Things Exempt from Distress.

The things that are exempt from distress may be arranged in two classes, namely:

1. Things absolutely privileged.
2. Things conditionally privileged.

The first class comprises:

1. Things annexed or pertaining to the freehold, which formerly included not only fixtures belonging to the tenant but also growing corn, grain and other products of the soil. Fixtures (doors, windows, furnaces, etc.,) or

anything of a similar nature and not permanently detached from the freehold were and are privileged from distress.

In *Gray vs. Holdship*, 17 S. & R., 413, it was decided that a copper kettle or boiler in a brew house is part of the freehold.

Growing corn, grass and other products of the soil, though not distrainable at common law, become so by the Act of March 21st, 1772, but the words "product of the soil," as used in the act will apply only to things similar in nature to those specified therein, namely: "corn, grain, grass, hops, fruit, pulse," in fact such product as is in the process of ripening and is capable of being cut, gathered and laid up. Flowers, shrubs and trees growing in the soil are not subject to distress, nor is the product of them while unsevered. (*Clark vs. Gaskarth*, 8 Taunton, 431.)

Flowers, shrubs and trees planted in pots or tubs and, therefore, not affixed are subject to distress.

The Act of 1772 empowers the purchaser of growing crops, to enter on the premises and when ripe, to cut, gather and carry away the crop. Goods of a chattel nature are generally distrained in preference to growing crops.

2. Things delivered to a person exercising a public trade to be carried, worked up, wrought or managed in his trade or employ.

Mr. Justice Huston:—"For myself, I incline to think if the articles are such as that the trade cannot be exercised without them, and if they have been and are intended by the debtor to be used by himself and journey-men, or apprentices they are exempted in this State." (*McDowell vs. Shotwell*, 2 Wharton, 26.)

Per Curiam—"Where a tenant of land receives the cattle of third persons to be pastured at hire are they subject to a distress for rent? Certainly not; else the law of distress would be a mere trap to catch other people's property. Where in the course of a tenant's business he receives the property of third persons as a means of making a livelihood, it is not subject to distress." (*Cadwalader vs. Tindall*, 20 Pa., 422.)

Implements of trade are privileged from distress for rent if they be in actual use at the time, or if there be any other sufficient distress on the premises. But if not in actual use, and if there be no sufficient distress on the premises, then they may be distrained for rent. (*Simpson vs. Hartopp*, 1 Sm. L. C., 450.)

As a general rule the property of a stranger found on the demised premises is liable for rent. As the landlord cannot be expected to know just how much is the tenant's and how much the stranger's, the latter has a remedy against the tenant. (*O'Donnell vs. Seybert*, 13 S. & R., 57; *Weidel vs. Roseberry*, 13 S. & R., 180; *Kessler vs. McConachy*, 1 Rawle, 439.)

Goods deposited with another to await an opportunity to be sold are not liable to distress or sale for rent owing by the bailee. The law in affording this protection looks to the convenience of trade, and not to the business of the bailee or the particular character of the place where the goods are deposited. (*Connah vs. Hale*, 23 Wend., 461.)

A person undertaking to carry goods of all persons indifferently for hire is a common carrier and the goods are privileged. (*Gisbourn vs. Hurst, Salkeld*, 249.)

In *Fowker vs. Joyce*, 3 Lev., 260, it was held that the cattle going to London market and put into a close, with



the consent of the landlord and the tenant, to graze might be distrained by the landlord. This was overruled, however, in the case of *Tate vs. Glee*, 2 Wm. Saunders, 298.

A horse was sent saddled to be shod and the saddle was taken off and laid beside him. Held, that the saddle was distrainable, because it was not necessary for shoeing the horse to send him saddled. (*Rolle's Abr. "Distress."*)

Brewers' casks sent to a public house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the public house. (*Joule vs. Jackson*, 7 M. & W. 450.)

By the Act of May 13th, 1876, all pianos, melodeons and organs leased or hired by any person are exempt from distress for rent due the person hiring them. The owner must give notice himself, or his agent for him, to the landlord or his agent, that the instrument is leased or hired. The notice should be given to the lessor when the piano is delivered to the tenant or before the right of distress has accrued.

In *McGeary vs. Mellor*, 87 Pa., 464, Mr. Justice Gordon said: "The dealer in the wares subject to exemption has it in his power, by notice, not only to relieve his own property from distress but also, by judicious exercise of that power to prevent injury to the owner of the demised premises. If the notice be given when the leased instrument be put upon the demised premises or at a time when there is no rent due, the tenant is thereby prevented from acquiring a false credit and the landlord is informed that he must look to the goods for the rent of the current quarter, etc. If, on the other hand, notice be given after the rent is due, it may happen that the tenant

may have received a credit to which he was not entitled, and that the landlord may lose, by no default of his own, a lien which lawfully attached upon the goods."

3. Things of a perishable nature, such as fresh meat, milk, fruit and sheaves of grain or loose hay that cannot be returned to the tenant in good plight, or otherwise incapable of identification. Since the Act of April 9th, 1849, it is probable that this exception is only in Pennsylvania in relation to such things as will perish between the day of distress and the day of sale. This act supersedes all acts which were passed before it. By its provisions property to the value of three hundred (\$300) dollars, exclusive of all wearing apparel of the tenant and his family (which remain exempted as heretofore), owned or in possession of the tenant, are exempted from distress.

4. Things in the actual use of the tenant are held at common law to be privileged from distress, on the reasoning that any attempt to distrain them might lead to a breach of the peace.

The Act of April 17th, 1869, exempts from distress sewing machines belonging to seamstresses.

The Act of March, 1870, exempts from distress, sewing machines owned by private families.

It seems that sewing machines rented or hired are unprotected from distress.

5. Animals *ferae naturae*, which class includes dogs, cats, rabbits and deer, in which it was supposed no property of value could exist. This does not include deer kept in a park or close for a profit. (Davis vs. Powell, Willes, 46.)

Any animal kept for gain, show or merchandise, and valuable dogs can be distrained for rent.

6. Things in the custody of the law and which have been levied upon by the sheriff or attached.

II. Things conditionally privileged from distress were:

1. Beasts of the plough and implements of husbandry, which were not distrainable at common law provided that there were other sufficient distress on the leased premises. The reason of this conditional privilege was that a man should not, if possible, be deprived of the means of making a living for his family and, also, that husbandry should not be discouraged.

2. Beasts which improve the soil, such as sheep and other animals.

These two conditional privileges have been superseded by the Act of April 9th, 1849, which will be discussed more fully later.

The chattels of ambassadors and public officials of foreign nations are exempt from distress because, by international law, they are considered to be out of the jurisdiction of the country they may be in. An Act of Congress passed in 1790 also protects them. If they engage in business foreign to the purport of their appointment, the privilege does not extend to the goods pertaining to such business.

If a landlord either expressly or impliedly consent that chattels placed on the premises by a stranger shall be *privileged* from distress, he will be a trespasser if he *distrain* on them.

### III.

#### Exemption Laws.

**On** March 26th, 1814, an act was passed limiting the *claim* of the landlord for rent to that of one year.

**On** March 29th, 1821, an act was passed exempting *from* distress for rent one stove.

On March 31st, 1821, an act was passed exempting from distress household utensils to the value of \$20; tools of a tradesman to the value of \$20; all wearing apparel, two beds and the necessary bedding, one cow, two hogs, six sheep and feed for said animals from November 1st till May 31st; also, a stove and the pipe and the necessary fuel, a spinning wheel and reel, and also one hundred pounds of meat, six bushels of potatoes, six bushels of grain and all Bibles and school books in use in the family.

This Act repealed the Acts of 1814 and 1821 and was itself repealed by the Act of April 9th, 1849, which exempts from distress property to the value of three hundred (\$300) dollars, exclusive of all wearing apparel of the tenant and his family, and all Bibles and school books in use in the family (which remain exempted as heretofore) owned by or in possession of the tenant.

The right of the wife or family to claim the exemption is not affected by any waiver of the husband, and if the claim be disregarded and the chattels sold, the money may be ruled into court and be substituted for the chattels.

Under a domestic attachment, \$300 worth of goods were set apart to the wife, and execution was issued against the husband on a judgment waiving the exemption and the same goods levied on and sold. In an interpleader proceeding it was held that the wife was entitled to all the proceeds and the execution creditor was directed to pay all the costs. Her right is not affected by her husband's waiver of the exemption, the law withdrawing the property from the grasp of his creditors and allowing it to his wife and family, it ceased to be his property for the purpose of execution. (*Hess vs. Beates*, 78 Pa., 429.)

The exemption is limited to the articles claimed and gives no right to the wife or family to claim \$300 out of any sale. (McCarthy's App., 68 Pa., 217.)

The Wages Act of April 9th, 1872, is not an exemption act, but when a landlord distrains for rent and the premises leased are mines or manufactures, a preference of \$200 each is given to the clerks, mechanics and laborers there, if earned within six months previous to the sale of the employer's assets. The landlord's claim for rent comes next.

The Act of June 12th, 1878, enlarged this and provided specially that the laborers mentioned in the Act shall have preference over the landlord's in all claims for rent where the lessee employs the miners, mechanics, laborers or clerks.

Contractors are not laborers or clerks in the meaning of these Acts. (Wentworth's App., 82 Pa., 469.)

An Act passed May 8th, 1874, provides that the exemption laws of this Commonwealth shall not be construed to extend to any debtor not a resident thereof. This only made clear what was decided before.

Per Curiam.—“There are strong reasons for holding that non-residents do not come within either the policy or the provision of the exemption law. All laws of this character may be said to constitute a system of poor laws for the State, and one intended for the protection of the poor of our own State, and not to operate in favor of persons who are not residents of the State and whose property is generally beyond the reach of the process of our own courts. Except for the protection afforded by these laws to our own people, many debtors might be reduced to such a state of destitution as to make it necessary to subsist them at the public charge, a considera-

tion that can only apply to residents of our own State. Again, the officer making levy is liable to an action if he violates this law, a conclusion which is predicated upon the presumption that he has or may acquire a knowledge of the property of the persons intended to be protected, which cannot well be if they are non-residents." (Snow vs. Dill, 6 W. N. C., 330; Yelverton vs. Burton, 26 Pa., 351.)

Partnership property is not exempt under the Act of 1849. (Bonsall vs. Comly, 44 Pa., 442.)

The property of an individual partner is. (Spade vs. Bruner & Carl, 12 Pa., 359.)

Where the personal property does not amount to \$300 and the real estate cannot be divided, the debtor is entitled to the balance out of the proceeds of the sale of the real estate. (Seibert's App., 73 Pa., 359.)

The assignee of a tenant cannot claim exemption, on a distress levied upon his goods, where the process is in the name of the original lessee and the sub-tenant has never been recognized by the landlord. (Rosenberry vs. Hallowell, 35 Pa., 39.)

The sub-tenant's goods are liable to distress even though he has paid his rent in full to the tenant from whom he leased. (McComb & Howden's App., 43 Pa., 435.)

A landlord distrained goods of a sub-tenant having previously distrained the goods of the tenant. Held, that the second distress was legal if he could show that the first distress was insufficient. (Quinn vs. Wallace, 6 Wharton, 452.)

## IV.

**Waiver of Exemption.**

An oral agreement to waive the benefit of the exemption laws, if made without consideration, is void. (*Hoffman vs. McDermond*, 1 Pittsburg, 197.)

The privilege being a personal one may be waived by the debtor. Waiver may be made either expressly or by implication; and a debtor waives it when he fails to request an appraisement in due season. The privilege is not an exemption from having his property sold, but a right to obtain an exemption in a designated manner, and he who would secure it must comply with the statutory conditions. (*Line's App.* 2 Grant, 197.)

## V.

**Duties of The Tenant in Exemption.**

Where the case is one of distress or a levy on personal property, the debtor should claim the exemption at the time of the distress or levy, and should demand of the officer or distrainer the appointment of three appraisers to appraise the property he elects to hold and should point out the specific articles he may wish to retain. (*Hammer vs. Freese*, 19 Pa., 255.)

He can make the claim either orally or in writing and must make it before the day of the sale and, generally, should make it before the advertisements are put up. (*Hammer vs. Freese*, 19 Pa., 255; *Diehl vs. Holben*, 39 Pa., 213; *Rodyen vs. Waterman*, 25 Pa., 182; *Miller's App.*, 16 Pa., 304; *Brant's App.*, 20 Pa., 141.)

If a debtor, at the time of appraisement of his goods,

disclaims title to a portion of those levied on, he cannot afterwards maintain an action of trespass against the constable for selling such goods. (*Gilleland vs. Rhoads*, 34 Pa., 187.)

A constable who disregards the provisions of the exemption law of 1849 by refusing to permit the debtor to select and retain goods to the amount of \$300, is liable to an action of trespass or case. (*Freeman vs. Smith*, 30 Pa., 264.)

If the sheriff disregards the claim for exemption and sells the land or goods claimed, the debtor has no right to any portion of the proceeds. His only remedy is against the sheriff. (*Mark's App.*, 34 Pa., 36.)

When the appraisement is evidently below the value of the goods, the court may set it aside. (*Sleeper vs. Nicholson*, 1 Phila., 348.)

If the appraisement be not publicly conducted, it may be set aside. (*Huddy vs. Sproule*, 4 Phila., 353.)

If a debtor against whom an extension has been issued falsely deny the ownership of his property, thereby hindering and delaying the sheriff in the collection of the debt, he forfeits his right to the benefit of the exemption law through the falsehood for the purpose of gaining time for the payment of the execution. (*Strouse's Ex. vs. Becker*, 38 Pa., 190; *Diffenderfer vs. Fisher*, 3 Grant, 30; *Gilleland vs. Rhoads*, 34 Pa., 190.)

The fraudulent concealment of other property liable to execution, for the purpose of hindering and delaying the creditor by preventing a sale of the property levied on, is a bar to the debtor's right, under the exemption law, to retain the property seized.

Fraud is no bar if it is independent of the transaction in which the levy was made; but when it exists in the



very transaction, it is a positive bar and is not to be used merely in mitigation of damages. (*Emerson vs. Smith*, 51 Pa., 90; *Diffenderfer vs. Fisher*, 3 Grant, 30; *McCarthy's App.*, 68 Pa., 217; *Smith vs. Emerson*, 43 Pa., 456; *Gilleland vs. Rhoads*, 34 Pa., 190.)

The exemption under the Act of 1849 applies only to property owned by the debtor and not to such as he has merely in possession.

The debtor must also claim the exemption against every successive writ, even for the same debt, but where several writs are in the hands of the sheriff at the same time, one claim is enough. (*Bechtel's App.*, 2 Grant, 375.)

The claim for exemption may be made during the absence of the debtor by any one in charge of the premises, more especially by his wife or a child of reasonable age. (*Wilson vs. McElroy*, 32 Pa., 82; *McCarthy's App.*, 68 Pa., 217; *Meitzler's App.*, 73 Pa., 368; *Waugh vs. Brickel*, 3 Grant, 319.)

A bachelor debtor may claim the benefit of the exemption law, though it is generally spoken of as intended for debtor's family. (*Diffenderfer vs. Fisher*, 3 Grant, 30.)

## VI.

### Right to Distrain on Property Fraudulently Removed.

By the Act of March 21st, 1772, if a tenant fraudulently or clandestinely removes his goods from the demised premises with intent to prevent a distraint, the landlord, within thirty days after the goods are removed, can take and seize such goods wherever the same may be found or a distress for the arrears of the rent, provided the goods have not been sold bona fide and for a valuable

consideration before such seizure. The Act of March 25th, 1825, extends this power.

In order to make a removal fraudulent, under either of these Acts, it must be made at night or the landlord must be deceived by some fraudulent statement made by the tenant. A mere removal in the day time, without the consent of the landlord, is not fraudulent, nor in such a case can the landlord follow the goods; it is for him to be vigilant.

Removal of goods by tenant in the day time when the landlord is out of town is not of itself  
or fraudulent. (Grant & McLane's App., 44 Pa., 477.)

An open and notorious removal in the day time without notice to the landlord is not fraudulent within the meaning of the Acts of 1772 and 1825, but there may be circumstances under which a removal, even in the day time, would be considered fraudulent. (Purfel vs. Sandt, 1 Ashmead, 121.)

The tenant is not bound to give notice to the landlord that he is about to remove his goods nor is he under any obligation not to remove them; it is the landlord's business to be vigilant; he has a right to distrain wherever the rent has become due, and if he neglects it he runs the risk of losing this extraordinary remedy with which the law has favored him. (Hooper vs. Crowley, 12 S. C., 216.)

In all parts of Pennsylvania, excepting Philadelphia—by Act of 1825—Pittsburg and Allegheny—by Act of 1870—a tenant may remove his goods from the demised premises at any time before the rent is due, either openly or clandestinely, and the landlord cannot follow them.

The goods of a tenant's assignee, or under-tenant, can be so followed and seized. The assignee of a lease

stands as to his liability for the rent in the same situation as the lessee; and if his goods be clandestinely removed from the premises, they may be followed and distrained for the rent.

The goods of a stranger though clandestinely removed, with the intent to remove a distress, cannot be followed and seized. They can only be distrained while they are on the premises. (*Adams vs. LaComb*, 1 Dallas, 440; *Sleeper vs. Parish*, 7 Phila., 247.)

If goods of a stranger are followed and distrained, he can recover damages. When no actual damage is proved beyond the mere taking, and there is nothing to show that this was oppressive or wanton, the jury should limit the compensation awarded to the injury actually proved. (*Scott vs. McEwen*, 2 Phila., 176.)

## VII.

### Subrogation—Appraisement.

The right of distress is a personal one, and may be waived by the lessor, but cannot be subrogated or assigned for the benefit of another. (*Shouffler vs. Coover*, 1 W. & S., 400.)

If a sub-tenant pay to the landlord the rent due by the original tenant the landlord cannot subrogate his right of distress to the sub-tenant by distraining on the goods of a tenant for the rent thus paid. The sub-tenant has his own remedy against the tenant.

The Act of 1772 provides that five days, besides the day of the distress, shall be given to the tenant wherein to replevy the goods. Now, if the day in which the distress is laid happen to be Tuesday, the fifth day will be Sunday, which is not counted, and Monday becomes the fifth

day. Saturday, also, does not count. At the end of the five days an appraisement must be made and the goods removed, unless the tenant consent to their remaining on the premises. If he should refuse the distrainer should carefully remove the goods to some place in the country not more than three miles distant from the place where distrained. (*McKinney vs. Reader*, 6 Watts, 34.)

The goods can be kept on the premises during the five days, whether the lessee consents or not.

In *Waitt vs. Ewing*, 7 Phila., 195, it was held that goods distrained may remain impounded on the premises for a reasonable time, and that seven days was a reasonable time.

The Act of 1772, which says that the landlord shall or may sell the goods distrained is imperative, and makes it the duty of the landlord to sell. (*Quinn vs. Wallace*, 6 Wharton, 460.)

The tenant may prevent the sale by replevying the goods. He may replevy up to the time of sale. (*Brisbin vs. Wilson*, 60 Pa., 452.)

The tenant can also relieve the distress by paying the rent and costs at any time up to the sale.

The constable is not required to make either a distress or sale, but he is required to attend the appraisement, and if he makes the sale he is liable for the money collected. (*Cowen vs. Sheppard*, 2 Clark, 393.)

If, on a distress for rent, the goods distrained upon are sold without having been appraised and advertised, agreeably to the Act of 1772, the distrainer is a trespasser ab initio, and an action of trespass quare clausum fregit may be maintained against him. (*Kerr vs. Sharp*, 14 S. & R., 399.)

A distress was made on the 27th of November. An appraisement on the 2d of December was too early.

Such an irregularity makes the landlord a trespasser *ab initio*; a sale under such irregularity is void and trover can be maintained against the purchaser.

If he appraises too soon or there is no appraisement but he does not sell then there is no trespass. (*McKinney vs. Reader*, 6 Watts, 34.)

The notice of distress should be served either on the tenant personally or it should be left at his mansion house or some notorious place on the land. If the goods are sold without notice having been served the distrainer is a trespasser. But if there be no sale the distrainer is not a trespasser. (*McKinney vs. Reader*, 6 Watts, 34.)

In case of the landlord making a distress and sale when no rent is due, the Act of 1772 provides that the party distraining, his executor and administrator shall be liable in double the value of the goods with the cost of the suit.

Mr Justice Kennedy.—“By the section of the Act it will be perceived that it is the person or persons distraining who are made liable to the action and not the person or persons in whose names the distress shall be made.” (*Wells vs. Hornish*, 3 P. & W., 30; *Fretton vs. Karcher*, 77 Pa., 423.)

The landlord is liable to an action on the case under the statute of 52 Henry III.

An action on the case will lie under the same statute for distraining for more rent than is due. (*O'Donnell vs. Seybert*, 13 S. & R., 54.)

If the landlord distrain when no rent is due, he is a trespasser *ab initio*. (*Fretton vs. Koncher*, 77 Pa., 423.)

## VIII.

**Set-off Against Rent.**

The Legislature of Pennsylvania has passed several acts providing for the payment of taxes by the tenant of a landlord who does not reside in the township in which demised premises are situate. The tenant is liable to be levied on for road taxes and on paying the same can make it a set-off against rent, provided of course, that any contract between landlord and tenant as to the payment of road taxes shall not be impaired. This was the Act of 1802.

The Act of 1804 made tenants liable to payment for all taxes becoming due and payable during their occupancy.

The Act of 1834 makes the goods and chattels of any person occupying real estate liable to distress and sale for the non-payment of taxes assessed on the property during his possession. The Acts of 1802 and 1804 apply only to tenants but the Act of 1834 applies to any occupant of real estate, tenant or trespasser. The Act of 1804 applies to taxes becoming due and payable during the occupation; the Act of 1834 applies to such taxes as have been assessed during such occupation. (*Smeich vs. County of York*, 68 Pa., 441.)

These acts are still in force in all parts of Pennsylvania except in the city of Philadelphia, in which they are superseded by the Act of 1870. This act directs the Receiver of Taxes to appoint a Collector of delinquent taxes due the city, who shall hold office for three years and until his successor be appointed and qualified. The

Collector is authorized to levy on and sell the personal or real estate of the delinquent owner, wherever found. Under the Acts of 1802, 1804 and 1834 the Receiver of Taxes could seize the property of the tenant for taxes due by the landlord, but the Act of 1870 took this power away from him and did not confer it on the Collector of Delinquent Taxes. For some years the Collector supposed he had the rights which the Receiver formerly had and distrained property of tenants. In 1873 the case of *McAfee vs. Bumm* decided otherwise. The court said: "The Collector has only the power given him in this Act. He is to proceed immediately to collect all delinquent taxes out of the personal or real estate of said delinquent owners. He is invested with full and absolute power to sell the personal or real estate of said owner. The Act of 1870 does not contain in express terms or by implication a grant of powers similar to those given by previous acts to Receivers of Taxes."

In 1879 an act was passed giving the Collector power to distrain on the tenant's goods.

The Act of 1810 gave Justices of the Peace jurisdiction in cases of set-off when the amount of rent does not exceed one hundred dollars.

The tenant may show a failure of the consideration of the rent by the landlord's omission to fulfill his part of the contract, which operates as an exemption of the tenant from an equivalent portion of the rent.

In such case the measure of damages to the tenant is the difference between the annual value of the premises with and without covenants performed; speculative or remote damages, such as a loss of custom to the tenant, cannot be allowed. (*Peterson vs. Haight*, 3 Wharton,

150; *Fairman vs. Fluck*, 5 Watts, 516; *Beyer vs. Flustermacher*, 2 Wharton, 95; *Gray vs. Wilson*, 4 Watts, 39.)

Where a tenant sues his landlord it is optional with the latter to make a set-off of the rent due.

There cannot be a set-off against a set-off. A debt not due at the commencement of the proceedings cannot be set-off.

When a landlord brings suit before a Justice of the Peace for rent, the tenant must set-off any claim not exceeding \$100, which he may have against the plaintiff or be forever barred from recovery elsewhere. (*Herring vs. Adams*, 5 W. & S., 459; *Shoup vs. Shoup*, 3 Harris, 361.)

The Act of March 22, 1814, section 6, reads as follows: "The said Justices of the Peace and Aldermen shall have original jurisdiction in all cases of rent not exceeding one hundred dollars, to be recovered as debts of a similar amount are recoverable."

If a landlord distrain the goods of his tenant and refuse to allow the tenant's set-off, the latter may, if the rent due or set-off claimed be not more than one hundred dollars, apply to a Justice of the Peace, who will issue a summons citing the landlord to appear. The landlord may pursue his right of distress, but if he distrains for more rent than is equitably due him he becomes liable to the tenant in four times the amount wrongfully taken.

Set-off may be made in cases where a tenant sub-lets or assigns and then allows the rent due by him to his own landlord to go in arrear. His sub-tenant or assignee is then justified in paying the rent due to paramount landlord and can off-set the same against the rent due to the tenant, or if he owes no rent to the tenant he may recover by action or by set-off against the rent next due.



## IX.

**Demand of The Rent.**

As a general rule it is not necessary for the landlord to make a demand of the rent prior to making a distress, but to this there are some exceptions.

1. When the landlord has lapsed the day of payment and was not on the land on that day to receive his rent.
2. When by the provision of the lease the rent is made payable at some place other than the land out of which the rent is reserved.
3. When the right to distrain as in a rent-charge is given by the agreement of the parties.
4. When the tenant makes tender of the rent and the same is declined.
5. When the service under which the tenant holds is a personal one.
6. When the demise is of two separate properties.
7. When there is a penalty or nomine poena inserted in the lease.

## X.

**Rescue.**

The tenant may, in certain cases, rescue or retake from the person restraining the chattels distrained, but this he must not do with more than necessary violence. He may do this:

1. When no rent is in arrear.
2. But not when the distress is made for more rent than is in arrear.

3. When the distress is made off the demised premises or on the highway.

4. When made at night time or on Sunday.

5. When made by breaking through an outer door, gate or window.

6. When made after tender of the rent and costs and before the impounding.

7. When the chattels distrained are privileged from distress.

8. When the lessor has no reversionary interest in the demised premises.

Rescue can only be made before the goods are impounded, for when once impounded they are in the custody of the law. It can only be made by the owner of the chattels, or his agent or servant.

The remedy is a dangerous one, for, if the distress be legal in all particulars, the distrainer may follow the distress and retake it. (*Woglam vs. Cowperthwaite*, 2 Dallas, 69.)

In such cases the tenant making the rescue is liable, under the Act of March 21, 1772, section 2, to treble damages.

A stranger may rescue his own goods illegally distrained.

LOUIS dePUI VAIL.

*Ex. 11. 11. 11.*

# CLARENCE M. BUSCH,

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—IN—

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## CONTENTS.

|                                                             | Page |
|-------------------------------------------------------------|------|
| I. Land Titles in Pennsylvania, . . . . .                   | 697  |
| JOSEPH R. EMBERY.                                           |      |
| II. Notes, . . . . .                                        | 754  |
| III. The Quiz,                                              |      |
| Discuss the Doctrine of Renunciation of Contract, . . . . . | 758  |
| HORACE L. HENDERSON.                                        |      |

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# LAND TITLES

IN

## PENNSYLVANIA.

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## CONTENTS.

---

|                                                                                             |     |
|---------------------------------------------------------------------------------------------|-----|
| Table of Cases cited, .....                                                                 | i   |
| Table of Statutes cited, .....                                                              | iii |
| Table of Works cited, .....                                                                 | iv  |
| Chapter I. Origin, .....                                                                    | 1   |
| Chapter II. Titles Acquired before the Proprietary Government, .....                        | 7   |
| Chapter III. Titles of the Proprietaries, .....                                             | 11  |
| Chapter IV. Transfer of Proprietary Titles, .....                                           | 15  |
| Chapter V. Acquisition of Titles Through Land Office, .....                                 | 19  |
| Chapter VI. Acquisition of Titles by Improvement, .....                                     | 26  |
| Chapter VII. Acquisition of Titles Other Than Through Land Office and by Improvement, ..... | 29  |
| Chapter VIII. Title of the Commonwealth, .....                                              | 32  |
| Chapter IX. Transfer of the Commonwealth's Title, .....                                     | 36  |
| Chapter X. Tenures in Pennsylvania, .....                                                   | 41  |

## TABLE OF CASES CITED.

---

|                                                                         | Page.  |
|-------------------------------------------------------------------------|--------|
| Attorney General of Ontario v. Mercer, L. R. 8 App. Cas. 771, . . . . . | 42     |
| Bonnett's Lessee v. Derebaugh and Smith, 3 Binn 875, . . . . .          | 28     |
| Buchanan v. M'Clure, 2 Sm. Laws 181, . . . . .                          | 27     |
| Campbell v. Lear, 2 Sm. Laws 170, . . . . .                             | 27     |
| Campbell's Lessee v. Kidd, Huston's Lands, Titles in Penna., 150, . .   | 27     |
| Duer v. Boyd, 1 S. & R. 207, . . . . .                                  | 23     |
| Dunning's Lessee v. Caruthers, 4 Yeates, 17, . . . . .                  | 30     |
| Fothergill v. Stover, 1 Dall. 6, . . . . .                              | 31     |
| Ingersoll v. Sergeant, 1 Whart 337, . . . . .                           | 45, 46 |
| Johnson v. M'Intosh, 8 Wheaton 573, . . . . .                           | 1, 2   |
| Mitchell v. United States, 9 Peters 745, . . . . .                      | 2      |
| Pea Patch Case, 1 Wall, Jr. App. 30, . . . . .                          | 8      |
| Penn's Lessees v. Kline, 4 Dall. 402, . . . . .                         | 17     |
| Penn's Lessees v. Kline, 1 W. C. C. 207, . . . . .                      | 13     |
| Penn v. Lord Baltimore, 1 Ves, 444, . . . . .                           | 12     |
| Penn v. Penn, 2 Yeates 550, . . . . .                                   | 35     |
| Wallace v. Harmstad, 8 Wright 492, . . . . .                            | 44     |
| Worcester v. State of Georgia, 6 Peters 544, . . . . .                  | 2      |



## TABLE OF STATUTES CITED.

|                                                                                  | Page.          |
|----------------------------------------------------------------------------------|----------------|
| 12 Car. II, C. 24, . . . . .                                                     | 42             |
| Act of February 3, 1768, 2 Sm. Laws 124, . . . . .                               | 28             |
| Act of October 10, 1779, 2 Sm. Laws, 175, . . . . .                              | 27             |
| Act of November 27, 1779, 1 Sm. Laws, . . 14, 32, 33, 34, 35, 36, 44, 45, 46, 48 | 48             |
| Act of April 9, 1781, 1 Sm. Laws 529, . . . . .                                  | 36, 44, 45, 46 |
| Act of April 5, 1782, 2 Sm. Laws 13, . . . . .                                   | 36             |
| Act of April 1, 1784, Sergeant's Land Laws 74, . . . . .                         | 36             |
| Act of March 29, 1809, P. L. 122, . . . . .                                      | 37             |
| Act of April 17, 1843, P. L. 324, . . . . .                                      | 37             |

## TABLE OF WORKS CITED.

---

Blackstone's Commentaries.  
Cadwalader on Ground Rents.  
Fiske's Critical Period of American History.  
Gordon's History of Pennsylvania.  
Hazard's Annals of Pennsylvania.  
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Sharswood's Law Lectures.  
Smith's Laws.  
Weem's Life of Penn.  
Wright on Tenures.

# LAND TITLES IN PENNSYLVANIA.

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## CHAPTER I.

### ORIGIN.

By "land titles" we understand, in the words of England's great commentator, "the means whereby the owner of lands hath the just possession of his property"(1). The means whereby the original owners of land in Pennsylvannia had the just possession of their property, was discovery.

It was stated by Chief Justice Marshall, in *Johnson vs. McIntosh* (2), as an historical fact that upon the discovery of this continent by the nations of Europe, "the discovery gave title to the government by whose subjects, or whose authority, it was made against all other European governments, which title might be consummated by possession."

The right of the natives to the soil was a right of exclusive possession which they enjoyed by reason of their continued occupancy. It did not rise to the dignity of a title to the soil itself, and hence the nations of Europe claimed and exercised a power to grant the soil while yet in the possession of the natives. Speaking of the exercise of this power, the Chief Justice continued: "These

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(1). 2 Bla. Com. 195.

(2). 8 Wheaton 573.

grants were understood by all to convey a title to the grantees subject only to the Indian right of occupancy." (1.)

But this right of occupancy was something more than a mere tenancy at sufferance. And the same Chief Justice, some nine years later, again speaking of these grants, said they were well understood to convey merely the exclusive right of purchasing such lands as the natives were willing to sell (2). And again, a few years later, we find the Supreme Court of the United States declaring that lands in the possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation, as their common property, by a perpetual right of possession; that the ultimate fee was in the Crown or its grantees, subject to this right of possession, and could be granted by the Crown, "though possession could not be taken without their consent" (3.)

It was in recognition of this right of exclusive possession in the Indians that William Penn covenanted with the "First Purchasers" to extinguish whatever rights the Indians had to the soil conveyed. Penn's action in thus purchasing this right from the natives has been ascribed by tradition to motives of a purely philanthropic character, apparently overlooking the fact that such treatment of the Indians was the usual treatment they received from colonists in New York, Maryland, New Jersey and other places (4). It was a matter of right and not merely of grace that they should be so treated.

Tradition also pictures William Penn, soon after his

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(1). 8 Weaton 574.

(2). *Worcester vs. State of Georgia*, 6 Peters 544.

(3). *Mitchell vs. United States*, 9 Peters 745.

(4). Gordon's Hist. of Penna., 77.

arrival, in the shade of a large elm tree at Kensington, purchasing for a few baubles the entire province which had been recently granted, the purchase being accompanied by the ceremony of smoking the pipe of peace, giving a belt of wampum, and other traditional rites (1) as evidence of the solemnity of the occasion and the binding together with ties of everlasting friendship the bonds of the agreement. But here, again, is tradition committing traditional errors. The treaty which took place in December, 1682, "not sworn to and never broken," under the great elm tree at Kensington, was merely a treaty of amity and no lands are believed to have been purchased (2). Then, too, the purchases made from the Indians of the land within the original charter bounds of Pennsylvania extended over a period of more than one hundred years! The first purchase being made in July, 1682, by Wm. Markham, the deputy Governor, and the last in 1784 by the Commonwealth, the deed being executed by the Six Nations, October 23d of that year; a deed for the same land was also executed by the Wyandot and Delaware Indians, January, 1785 (3). During this period upwards of thirty deeds of purchase were executed. Nor was the purchase money a few inexpensive baubles. True, the price seems insignificant as we view the transactions at the present day, but in Penn's day and generation it was no trifle. The consideration in some cases amounted to four and five hundred pounds, sterling.

Then, too, the evidences of these purchases were not ceremonies of primitive simplicity or mysticism existing merely in the memory and traditional respect of the participating tribes. These purchases were evidenced by

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(1). Weem's Life of Penn, 154.

(2). Sergeant's Land Laws, 27. Haz. Ann. of Penna. 635.

(3). 2 Smith's Laws, 123.

the ordinary deeds of lease and release, then common in England, and recorded, many of them, in the Roll's office at Philadelphia. On various occasions when disputes arose between the Proprietary and the Indians as to the exact boundary of a particular purchase we find the deed produced and read to the Indians; they recognizing and respecting the signatures of the participating sachems and witnesses present. While William Penn thus recognized and respected the right of the Indians to the exclusive possession of the soil, he also recognized and protected his own right to the exclusive purchase of this right, and we find our Legislature enacting statutes to enforce and our courts interpreting laws and rendering decisions, giving effect to this right of pre-emption in the Proprietary.

But there seemed less difficulty in the law of discovery than in the fact of discovery. To the lands within the borders of Pennsylvania we find England claiming title by virtue of the Cabots' voyage along the coast of North America in 1498, and we find the Dutch denying the rightfulness of this claim and setting up a claim in themselves, based on the discoveries of Henry Hudson, an Englishman in the employ of the Dutch East India Company, who is said to have explored Delaware Bay in 1609 (1). As the title gained by discovery is an imperfect one unless followed by possession, the Dutch made haste to complete their title to land in Pennsylvania, and in 1623 Captain Mey, sent by the Dutch West India Company, ascended the Delaware river and built a fort near the present site of Gloucester. Several tracts of land were purchased by this Company, among others a large tract, purchased in 1633, which is supposed to have included a part of the present site of Philadelphia (2).

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(1). Haz. Ann of Penna. 2.

(2). Haz. Ann. of Penna. 13.

The Swedes also claimed title to lands within the province. Their title, however, being founded not on discovery but on an alleged transfer by England to Sweden of all her rights in the region of the Delaware, said to have been granted to the Great Chancellor of Gustavus Adolphus on his visit to London in 1631 (1).

There appears to be no record of such transfer and England never admitted its existence. However, in 1633, a Swedish West India Company was formed, and in 1638 a colony under one Minuet arrived at the mouth of the Delaware (2). After settling Fort Christiana, the Swedes purchased from the Indians both sides of the Delaware from Cape Henlopen to the Falls at Trenton (3). For many years the Swedish settlements prospered, grants of land were made to settlers and they established themselves near the present site of Philadelphia.

Meantime, the Dutch, who still retained their settlement, viewed with alarm the Swedish encroachments on their territory and protested against the continuance of such settlements. Finding their protests unavailing, the Dutch took more forcible measures and several conflicts ensued between the settlements, which were terminated in 1655 by Governor Stuyvesant coming over from New Amsterdam and subduing the Swedes, taking possession of the whole river in the name of the States General (4). The Dutch retained their authority until 1664, during which time many land grants were made in the Province of Pennsylvania.

In the year 1664 England began to press her claims to the lands discovered by the Cabots. She had never admitted the rightfulness of the Dutch and Swedish claims

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(1). XI Memoirs of Hist. Soc. of Penna., 22.

(2). Haz. Ann. of Penna., 42.

(3). Haz. Ann. of Penna., 64.

(4). Sergeant's Land Laws 19.

and in 1664 King Charles II issued letters patent to the Duke of York for a tract of land, including (inter alia) "all the territory from the west side of the Connecticut River to the east side of Delaware Bay" (1). The Duke immediately sent out an expedition which subjugated New Netherlands and the settlements along the Delaware. This region was formally ceded to the English by the treaty of Breda, concluded with the Dutch 1667 (2).

War again broke out between the Dutch and the English in 1672 and in 1673 the authorities at New York, and deputies from the settlements along the Delaware swore allegiance to the States General; but in 1674 Charles II again issued letters patent to the Duke of York for the same territory, the Dutch the same year surrendering all their possessions in America to England.

Thus, we see there were three early claimants of the title to lands in Pennsylvania; the English and Dutch claiming title by virtue of discovery and the Swedes asserting title derived through an alleged transfer by the English. As was often the case in those early days of discovery such controversy was adjusted by the arbitrament of force, might made right, and England ultimately triumphed in the assertion of her title to the lands in Pennsylvania.

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(1). Haz. Ann. 357. Gordon's History of Pa. 598.

(2). Sergeant's Land Laws, 19.



## CHAPTER II.

## TITLES ACQUIRED BEFORE THE PROPRIETARY GOVERNMENT.

Of the titles to land, acquired before the advent of the English, little can be said. The Swedes apparently obtained title to their settlements from grants emanating directly from the Crown of Sweden. No authority is known to have been given enabling the Swedish Governors to make grants of land, and existing copies of ancient grants fail to disclose an assumption of such authority on the part of the Governors (1).

The Dutch settlers, on the other hand, obtained many titles from grants made directly by the Dutch authorities at New York. Although there is no evidence of such authority being given to the Governors or Directors, there is abundant evidence of its exercise and the recognition of titles acquired thereby. In fact the patents issued by the Dutch Governors make part of the titles of present possessors (2).

On the termination of conflicts between the Dutch and Swedish settlements, it was expressly provided in the terms of surrender that the Swedish settlers should be secured in the possession of their individual property (3). They, of course, rendering allegiance to the States General instead of the Swedish Crown.

And on the cessation of hostilities between the Dutch and the English a special clause was inserted, in behalf

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(1). Sergeant's Land Laws 19, 20.

(2). Sergeant's Land Laws 21.

(3). Haz. Ann. of Penna. 183, 208.

of the Dutch and Swedes, in the final treaty of surrender securing to all, of whatever nation, who should submit themselves to His Majesty's authority, "protection in their estates, real and personal" (1).

Hence, we see that while the governments of Holland and Sweden were unable to maintain their claims of title to lands in Pennsylvania, the settlers were more fortunate and the right of the sower to reap where he had planted was respected and protected by the successive sovereign authorities. And William Penn, whose royal grant extended over the whole Province, could only take subject to the rights and titles already acquired and recognized under the Duke of York (2).

It will be observed that while the boundary of the grant to the Duke of York was (inter alia) "from the west side of the Connecticut River to the east side of Delaware Bay" (3), the subjugation of the colonial settlements extended to those on the west side of the Delaware. There have been many explanations suggested of this apparent stretch of authority on the part of the Duke of York, the more plausible ones being summed up in the statement of the Pea Patch Case (4), as follows: "Whether he (the Duke of York) thought that the Dutch settlement on the Delaware, having been at all times and at the very date of the conquest of New York, a part, appendix, and dependency of the latter place, necessarily followed its course and fortune so passed into his hands by the terms of his patent, which gave him New York and all powers of Government over the country conveyed and all its appurtenances; whether there might have been something

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(1). Haz. Ann. of Penna. 364.

(2). Mr. Lawrence Lewis (Original Titles in Phila.) takes a contrary view and says, p. 66, "As regards the titles derived under the Swedes and Dutch he (William Penn) was under no obligation to acknowledge their validity."

(3). *Infra* p. 6.

(4). 1 Wall. Jr. App. 80.

in some commission or some instructions from the King to the English commander, which two centuries now rise up to hide from view and by which a title by conquest might have enured to the Duke and not to the Crown; whether the Duke considered that he had no title in law and took possession only as a successful conqueror, meaning to procure or make at some future time a confirmation of what he did; or whether, finally, he exercised the most usual privilege of royal and noble blood and did not undergo the fatigue of thinking about the subject—this is all matter upon which speculation may exercise its ingenuity.”

But whatever may have been the sanction for his subjugation of the settlements on the west side of the Delaware, his subsequent jurisdiction over the province was recognized and acquiesced in, both by the colonists and the home government.

The Duke of York having express power by the terms of his charter to grant lands within his charter limits, transmitted this power to his representatives at New York, who duly exercised it. Under the authority of the Duke of York the estates of the Dutch who refused to submit themselves to the new government were confiscated and granted to other persons. It was further required, by proclamation, in July, 1666, that all persons who held old patents should bring them in to be renewed, and the persons holding lands without patents should take out patents under the English authorities (1). Confirmations were made both of Swedish and Dutch titles for lands at various places from the ocean up to the neighborhood of Philadelphia. Under Andros, the last of these English Governors, the mode of acquiring title

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(1). Haz. Ann of Penna. 370.

to lands was that afterwards generally adopted by William Penn and his heirs, of granting vacant land upon application, by warrant and survey (1).

On September 25, 1676, this Governor ordered that any person desiring land, make application to the court in whose bounds it is, who are required to order thereon and certify fit proportions not exceeding fifty acres, except upon extraordinary occasions, which certificates to be a sufficient authority or warrant for the surveyor who had been appointed by Governor Andros to survey the same, and with the surveyor's return to be sent to New York for the Governor's approbation (2). Patents were subsequently to be issued and recorded.

The orders made by the court of Upland (Chester) pursuant to these instructions and the patents issued by Governor Andros in confirmation thereof, are very numerous.

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(1). Sergeant's Land Laws 2L

(2). 7 Penna. Archives ( N. S.) 785.

## CHAPTER III.

## TITLE OF THE PROPRIETARIES.

William Penn's title to the lands in Pennsylvania was derived from the charter granted by King Charles II under date of March 4th, 1681. The land included in this charter is therein described as "bounded on the east by the Delaware River, from twelve miles distance northward of Newcastle town, unto the three and fortieth degree of northern latitude, if the said river does extend so far northward, but if said river shall not extend so far northward, then by the said river so far as it doth extend. The said land to extend westward five degrees of longitude, to be computed from the said eastern bounds, and the said land to be bounded on the north by the beginning of the three and fortieth degree of northern latitude, and on the south by a circle drawn at twelve miles distance from Newcastle, northward and westward, unto the beginning of the fortieth degree of northern latitude, and then by a straight line westward to the limits of longitude above mentioned" (1).

Within these boundaries there existed the very serious conflicting claim of Lord Baltimore, the Proprietary of Maryland. This was only one of the many conflicts which arose among English colonists in this country, owing to conflicting grants made by the Crown to diverse companies and individuals. Royal grants being often made in royal ignorance of the extent and configu-

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(1). Charter of Penn.

ration of the new continent (1). In 1606 James I had granted to the London Company all that territory between the thirty-fourth and forty-first parallels of north latitude, while to the Plymouth Company was granted all that territory between the thirty-eighth and forty-fifth parallels. These conflicting grants overlapping each other almost exclusively within the borders of Pennsylvania. In 1632 Lord Baltimore succeeded to the northern portion of the former grant to the London Company, "which lies under the fortieth degree of north latitude," as expressed in his charter dated June 20.

This conflict between the Proprietaries of Pennsylvania and Maryland was not destined to immediate settlement but was waged with much spirit and vigor until long after the death of both Proprietaries. In 1732, after the dispute had been pending for nearly fifty years, the heirs of William Penn and Lord Baltimore entered into an amicable agreement for settling the controversy but the performance of this agreement was put off by Lord Baltimore under various pretexts and the Proprietaries were driven to the English Court of Chancery for relief. In 1750, Lord Chancellor Hardwicke decreed specific performance of this agreement (2), but the Maryland Proprietary continued to delay the execution of the decree. A supplemental bill was filed, pending which, in 1760, a new agreement was made, pursuant to which Mason and Dixon's line was run, being completed in 1767, which ultimately settled the dispute between the Proprietaries and established the present boundary between these two provinces.

Whatever rights had been acquired by the Duke of York to any lands within the province were conveyed to

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(1). Fiske's "Critical Period of American History," 188.

(2). Penn v. Lord Baltimore, 1. Ves. 444.

William Penn by deed of lease and release, executed August 31st, 1682 (1). The rights of settlers already acquired and recognized under the authority of the Duke of York were respected and acquiesced in by the Proprietary.

By force of the royal charter, William Penn was sole owner and Proprietary not only of the government but also of the soil of Pennsylvania, not already appropriated, not only in a political but in his private capacity (2). His title was established by a proclamation of the King, dated April 2d, 1681, calling upon all persons in Pennsylvania to submit themselves to Penn's lawful authority (3). The magistrates under the Governor of New York, accordingly, ceased their functions and the government was remodeled after the new Proprietary design.

William Penn retained his title unquestioned until the beginning of 1693, when he was deprived of his government, owing to pernicious influences exerted by the enemies of Penn upon the newly crowned King and Queen. But if Penn had enemies at Court, he also had more powerful friends, through whose intercessions he was, in August, 1694, restored to his full Proprietary rights (4).

In 1708, Penn again parted with his title, he having in that year mortgaged his entire interest in the province (with slight exceptions) to seven trustees, by deed of lease and release, to secure the repayment of £6,600 within two years (5). This sum Penn had found it necessary to borrow to carry out his plans of settlement and

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(1). *Haz. Ann. of Penna.* 596.

(2). *Lessees of Penn vs. Kline*, 1 W. O. C. 207.

(3). *Haz. Ann. of Penn.* 502.

(4). *Proud's Hist. of Penna.* 400.

(5). *Sergeant's Land Laws* 39.

colonization. This mortgage was not satisfied until 1729-30, by indentures executed January 13 and 14, reciting that the whole of the mortgage money under the mortgage of 1708 had been repaid (1).

William Penn died July 30th, 1718. A contest arose over his will, which lasted a long time, not being finally terminated until 1732. After several intermediate conveyances the title to the soil and government of the province was at length, in 1742-3, wholly vested in his sons John, Thomas, and Richard (2). John possessing one-half interest and Thomas and Richard each one-quarter interest. John Penn died in 1747 without lineal descendants and his interest became vested in his surviving brothers, Thomas and Richard. At the outbreak of the Revolution the title was vested in the lineal heirs of Thomas and Richard Penn. The Revolution put an end to the political supremacy of the Proprietaries and the Divesting Act of 1779 (3) put an end to their title to the unoccupied land in the province except those lands which they held in their private capacity and also those lands in the Proprietary tenths or manors. It is true, the validity of this act was questioned, but the objections to it are of little weight at the present day, for it is generally held that the Penns estopped themselves from avoiding it by the acceptance of the donation of £130,000 made by one of provisions of the act, to show, as stated in the Act, the regard of the citizens of Pennsylvania to the memory of the founder of the Commonwealth and his family and to prevent defeating expectations under marriage settlements and testamentary dispositions.

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(1). Lewis Orig. Tit. in Phila. 45.

(2). Lewis Orig. Tit. in Phila. 46.

(3). 1 Smith's Laws 479.



## CHAPTER IV.

## THE TRANSFER OF PROPRIETARY TITLES.

Th first titles conveyed by Penn were to a certain class of persons known as "First Purchasers." These titles were completed, so far as the instruments of title were concerned, in England. Deeds of lease and release were duly executed and signed by William Penn, prior to the embarkation of the first colonists to Pennsylvania. These deeds were indefinite in description and location, as was necessarily the case under the circumstances, but they gave a full and complete title to specific land upon a survey being made pursuant thereto, without the issuing of subsequent letters patent or other writing, although a patent of confirmation did in some cases issue. These deeds contained a covenant, on the part of William Penn, to extinguish whatever rights the Indians had in the soil conveyed, and on the part of the purchaser to record his deed within six months of the establishment of a rolls office in Pennsylvania.

These "First Purchasers" enjoyed certain privileges and immunities not extended to subsequent purchasers. *They* were to receive as part of their purchase a lot in a *city* to be laid out, in size to equal the proportion of ten *acres* for every five hundred acres purchased, if the place *will* allow it. This privilege, however, they failed to en-  
*joy,*  
*ably* owing to the large amount of lands sold, consider-  
 over 300,000 acres (1), as it was thought that if the

(1) *2* Smith's Laws 106.

proportion was adhered to, it would make the city too large for practical convenience. In lieu thereof, the "First Purchasers" received the percentage promised, in lands adjoining the city as finally laid out, these lands being known as the "Liberties." They also received a city lot less proportionate than the amount originally promised, not, however, as part and parcel of their purchases but appurtenant thereto.

Of the subsequent purchases of land in Pennsylvania, title was usually conveyed through the medium of agents, owing in part to the periodical absences of the Proprietary from the province and partly to the increasing demands for conveyances.

William Penn, not coming to the province when the tide of emigration set in, empowered his deputy governor and kinsman, William Markham, who was the first to arrive in the province under the Proprietary (1), by a commission dated April 10th, 1681, "to survey, set out, rent and sell lands" (2), and warrants, issued by Markham, are to be found among the early records of the Province.

After the arrival of William Penn, October 27th, 1682, and during his stay in the province, all warrants and patents will be found to bear his own signature. During the absence of Penn, Commissioners of Property were appointed by him to superintend the granting of land for such sums as to them should seem reasonable (3), and to grant and sign in his name, warrants and patents therefor. After 1732 warrants and patents were signed by the sons of William Penn or their deputy Governor or President of the Council.

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(1). Haz. Ann. of Penna. 516.

(2). Haz. Ann. of Penna. 504.

(3). Sergeant's Land Laws 35.

The most important agency instituted by William Penn to carry out his plan of settlement and colonization of the province was the Land Office. Here applications for land were to be made; warrants duly signed by the Proprietary or his authorized deputies, to be granted; surveys to be ordered; and, finally, patents to issue.

The officers comprising the Land Office were appointed by the Proprietary, and were the Secretary, Receiver-General and Surveyor-General. Each of these officers was at the head of a distinct office in the system of granting lands, and when they were convened for the purpose, they constituted as a whole, the Land Office.

It has been asserted that the Land Office was closed from the year 1718, when William Penn died, until the arrival of Thomas Penn, in the year 1732. In fact, in the case of Penn's Lessees vs. Kline (1), the report says the original warrant and survey could not be returned into the Land Office at that time "because the Land Office continued shut from the death of William Penn, in 1718, until the arrival of Thomas Penn, in 1732." But while it is true the Land Office was "shut" as to these particular lands in dispute, it was only because they had not yet been purchased from the Indians. For all substantial purposes the Land Office remained open (2). Mr. Smith, in his note, says: "But it clearly appears upon a very minute examination that there was no time when the Land Office can be said to have been shut or when warrants could not be procured" (3).

The Board of Property was another agency instituted to carry out the plan of settlement and colonization. It consisted of the officers of the Land Office met together to

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(1), 4 Dallas 402.

(2), 2 Smith's Laws 148.

(3), 2 Smith's Laws 147.

examine contested claims arising in the various branches of the Land Office. The parties were notified and heard in support of their claims and a conclusion was reached as to what ought to be done by the officer whose duty it was to act in relation to it. Proceedings before the Board were usually instituted by filing a caveat or "caution" in that branch of the Land Office where the controversy arose. A caveat could be interposed at any step of the proceedings to acquire title to vacant lands, and the effect of it was to suspend further proceedings, except upon a special order of the Board of Property; until the caveat was determined. The members of the Board of Property, however, did not constitute a court and their decisions were not binding upon the courts, although respected as those of men well acquainted with the land law of the Province.

## CHAPTER V.

## ACQUISITION OF TITLE THROUGH THE LAND OFFICE.

It would be very desirous to ascertain the exact state of the Land Office at every period of the Provincial Government, but it is quite impossible as no uniform or regular system existed before 1765 (1). Even as late as 1753 we find the Assembly, in an address to Governor Morris, declaring "that the state and management of the Land Office is pretty much of a mystery" (2). This is not to be wondered at when it is considered that the grants of land and confirmations of title were matters in the breasts of the Proprietaries and their officers, who disposed of the territory according to their own will and pleasure, professedly by formal methods, but frequently by informal modes and agreements of their own, varying with the expediency of the times, the change of officers, or special influences (3). In 1765, new regulations were adopted and a regular system of obtaining title through the Land Office was established. This system was somewhat varied by subsequent acts, but after 1765 there always existed some system of acquiring title to lands.

However, whatever may have been the actual condition of the Land Office prior to 1765, it apparently was intended that persons desiring to take up vacant land should make a written application at the Land Office, and

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(1). 2 Smith's Laws, 147.

(2). 2 Smith's Laws, 137.

(3). Sergeant's Land Laws, 6.

upon payment of the purchase money a warrant, duly signed by the Proprietary or his authorized deputy, would issue from the office of the Secretary of the Land Office, directing the Surveyor-General to make a survey for the warrantee. This warrant was taken to the Surveyor-General, who filed it in his office, and made out a copy which he transmitted to the deputy surveyor together with an order from him to make the survey. Originally, the warrant itself was forwarded to the deputy surveyor, but later on the practice obtained of transmitting a copy. After the deputy received the warrant or copy and executed it, it was the duty of the deputy (on payment of his fees) to return the survey, with a draught of the boundary lines and other details, to the office of the Surveyor-General, where they remained of record for the inspection of all concerned. When a patent was to issue, the Surveyor-General transmitted a copy of this return to the Secretary of the Land Office, and the patent conformed to it. This formal method, however, was not always pursued. Various informal orders, agreements and other modes of consenting to appropriations of land by individuals were obtained from the Proprietary officers from time to time, which were recognized as sufficient foundations for valid titles. For the soil of the province, after its purchase from the Indians, belonged exclusively to the Proprietaries, to sell, grant or dispose of as they saw fit, and their consent, in whatever way shown, was sufficient to vest an equitable title, which a court would protect. "It was not until 1765 that these modes of originating titles was entirely put an end to" (1).

By the regulations of 1765, the prescribed mode of ac-

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(1). Sergeant's Land Laws, 37.

quiring title through the Land Office, was for the person desiring to purchase land to make a written application to the Secretary of the Land Office, who, instead of granting a warrant, entered in a book, such person's name, with the date of his application and the description or location of the land. A copy of this application was sent to the Surveyor-General's office, whose duty it then became to transmit copies of the same to his deputy surveyor in the district where the land lay, together with an order to survey the lands agreeably thereto. The deputy then gave notice to the applier, requiring him to point out the lands to be surveyed. Whereupon, the deputy made the survey and returned to the office of the Surveyor-General a sketch of the land surveyed. The applicant had six months within which to pay the Receiver-General the purchase money and the interest thereon. After payment of the price and presenting to the Secretary of the Land Office, a receipt from the Receiver-General, a warrant would issue to the Surveyor-General to accept and make return of the survey into the office of the Secretary of the Land Office, whose duty it then was to make out a patent, unless the Commissioners of Property saw good reason to refuse the same. If the applier failed to show the deputy surveyor the land at the time appointed for making the survey, or failed to pay the purchase money within the six months, the Proprietaries, or their Commissioners of Property, were at full liberty, by the terms of the regulations, to grant the land to any other person or persons.

These regulations also required that all persons possessing or claiming lands by settlement or improvement should enter their applications in the Land Office within six months after its opening, and in default or neglect so

to do, the application of any other person or persons would be received for such lands (1).

An application is judicially defined as a request in writing to have a certain quantity of land at or near a place mentioned. Owing to changes in the Land Office, the use and effect of an application has been different at different times, yet the general definition given is applicable with equal propriety to all. An application was the inception of title when duly pursued. Unless duly pursued, it vested no title, created no right and formed no contract on which the party could be sued by the Proprietary or the State.

A warrant may be defined to be an order to the Surveyor-General to lay out a certain amount of land to a certain person and to make return thereof to the office of the Secretary of the Land Office. Under the Proprietary, no warrant was to issue until the purchase money had been fully paid, yet it was constantly done prior to 1765. Originally warrants were non-descriptive, merely authorizing a survey in any part of the lands purchased from the Indians and not theretofore appropriated. But, as the country became settled and boundaries became known, the practice began of designating with more and more certainty the place on which the warrant was to be laid, until, finally, a regulation of the Land Office required this (2).

The claim of a warrantee to lands surveyed under his warrant was originally ranked as a chattel interest and was transferrable and devisable as such, but later, from about 1758, it was treated as a title to real estate, on which ejectment might be maintained, the conveyance of which is within the Recording Statutes, and for all

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(1). 2 Smith's Laws 161.

(2). Huston's Land Titles in Penna., 418.



other intents and purposes. As against all the world but the Proprietary the title was a legal one and it was equally so against him if the purchase money was fully paid (1).

Of the survey, little need be said except that, from very early times, it was customary to accept a return of survey, although the quantity contained in it exceeded that specified in the warrant by ten per cent. This allowance seems to have originated in the surplus of six per cent. allowed by the Proprietary for roads and barrens, and four per cent., which was always allowed as the limit covering possible variations under different surveys (2). But the reason for the allowance was entirely lost sight of and it became customary to allow ten per cent. over and above the six per cent. for roads and barrens (3).

And even this limit was not observed by the surveyors from want of skill, carelessness or design, and many of the surveys returned a larger surplus; in some cases amounting to over one hundred per cent. Yet these returns were almost always accepted where they did not interfere with the rights acquired by others before the return of the survey, and a patent would be issued upon payment being made for the surplus. At one time, the Board of Property compelled the person applying for a patent to a tract of land, on which there was a surplus surveyed of more than ten per cent., to take out a new warrant for the surplus, or what they called a warrant of re-survey to include the whole quantity, the party releasing the first warrant (4). But this practice ceased long

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(1). 2 Smith's Laws 170; *Duer v. Boyd*, 1 S. & R. 207.

(2). Jones on Land Office Titles, 56 (note z).

(3). Jones on Land Office Titles, 56.

(4). Jones on Land Office Titles, 57.

before the Revolution. It did little good and much harm as it tended to unsettle estates.

Subsequent to the Revolution, statutes were passed regulating the issuing of patents on the return of surveys, containing more than the allowance of ten and six per cent. surplus.

A patent was the consummation of the grantee's title from the Proprietary. It may be defined as a deed from the Proprietary conveying to the grantee all his rights in the land, describing it by metes and bounds, and it passed, as respected the Proprietary, the complete legal title. Before a patent could be issued, the purchase money due and the patent fee, must be paid. One effect of a patent was to waive, on the part of the Proprietary, whatever informalities may have occurred, so that upon the granting thereof, the title of the patentee, as against the Proprietaries, became complete in equity and law (1). The Board of Property had, indeed, the power to withhold a patent for sufficient cause but when once granted they had no power to vacate it (2).

Generally, the grantee is concluded by the lines and boundaries described in the patent, though, perhaps, in a special case, there might be an exception. "Third persons claiming by warrant, application, settlement or otherwise, may show that the patent was wrongfully issued to the patentee; or, rather, that he is trustee for him who has the right, the material consideration being not who has the patent but to whom it ought to have been granted—for the Land Office in issuing the patent, act merely in a ministerial capacity, and cannot change the rules of law or rights of parties. And even though

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(1). Jones on Land Office Titles, 19.

(2). Jones on Land Office Titles, 20.

he who has a patent sell to a bona fide purchaser without notice, the vendee is in no better situation. A patent founded on a fraudulent survey or obtained by misrepresentation and deceit is void against third persons affected by it. His claim under the patent may be contested by one having a better right by settlement, warrant or location" (1).

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(1). Report of Secy. of Internal Affairs, 1890, A 189. Sergeant's Land Laws 155.

## CHAPTER VI.

## ACQUISITION OF TITLE BY IMPROVEMENT.

While the last chapter deals with the prescribed mode of acquiring title through the agencies constituted by the Proprietary, there was yet one other way which commands attention, by which title to Proprietary lands could be acquired, and that is by Improvement. Possession of lands being taken by persons without permission being first had from the Proprietary or any of his officers, followed by cutting down timber, clearing the land, etc., with intention to settle. The acquisition of title by improvement was fully recognized before the Revolution (1). The improvements necessary to establish title were actual, personal, resident settlement with a manifest intention of making it a place of abode, and the means of supporting a family, and continued from time to time unless interrupted by the enemy, or by going into the military service of this country during the war (2).

The title gained by improvement was not an absolute one, such as was acquired by warrant, survey and patent. It was subject to the payment of the price customary at the time of settlement, with interest, on such price until paid; and also the payment of the quit rent reserved on all lands sold by warrant (3). Yet it was a recognized title and would prevail against warrant, survey and patent subsequently issued. As to the origin of

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(1). Huston's Land Titles in Penna. 156.

(2). 2 Smith's Laws 175.

(3). Huston's Land Titles in Penna. 107.

this doctrine of improvement some think it to have been the result of proclamationssaid to have been issued in foreign countries, inviting adventurers to settle in the province by promising to wait for the purchase money until it suited their convenience to pay the same (1). Mr. Justice Chew, in *Campbell's Lessee vs. Kidd* (2), imputed the origin of improvement rights to the uniform practice of the Land Office, and asserted that the encouragement given by the Proprietaries and their officers to improvements, had clearly expressed their assent to the right of pre-emption of settlers on vacant lands, and was such a sanction as amounted to an implied contract on the part of the Proprietaries, that they would grant the lands to such persons on the usual and common terms; and should the Proprietaries refuse the terms so offered to them by the improver, Chancery would decree specific performance. This latter view seems generally to have been accepted. The Chief Justice, in the case of *Buchanan vs. McClure* (3), said the habit of the Proprietaries of "encouraging poor settlers who were in the beginning unable to pay any money, grew into a right, and what had originated in benevolence became the law of the land."

Title by improvement was recognized sufficiently to be subject to taxation by the Act of October 10, 1779 (4). It was also recognized sufficiently to permit an action of ejectment on the same (5). In 1796, in the case of *Campbell vs. Lear* (6), the court said: "The practice of bringing ejectment has now become settled law, though the legal title is in the Commonwealth."

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(1). *Huston's Land Titles in Penna.* 149.

(2). *Huston's Land Titles in Penna.* 150.

(3). 2 *Smith's Laws* 181.

(4). 2 *Smith's Laws* 175.

(5). 2 *Smith's Laws* 170.

(6). 2 *Smith's Laws* 170.

Mr. Justice Yeates, to whom more than any other man we are indebted for the system of law respecting land titles as it stood in 1815 (1), said: "The doctrine of improvements conduced greatly to the settlement and population of Pennsylvania, and happily blended the Proprietary interests with those of individuals" (2).

The doctrine of improvements, however, did not apply when such improvements were made on lands in which the rights of the Indians were not yet extinguished. In fact, heavy penalties, no less than death without benefit of clergy (3), were imposed on those who persisted in settling those lands except by military permit or some such special circumstances. While these severe laws respecting settlers on lands yet unpurchased from the Indians were upheld by William Penn from motives of equity, as well as sound public policy, they were somewhat relaxed after the sons of William Penn acquired the Proprietary interest.

There was another mode of acquiring title to lands somewhat akin to the acquisition of title by improvement, but which was thought to be sufficiently different to gain a separate and distinct designation. This was "title gained by settlement." The points of difference, however, were somewhat subtle and very refined, and an eminent authority on such matters declared that what was understood by "improvement" before the revolution, became known as a "settlement" thereafter, and this view is substantiated by reference to the Act of December 30, 1786, where the definition of an "improvement" is equally applicable to "settlement."

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(1). *Huston's Land Titles in Penna.* 468.

(2). *Bonnett's Lessee vs. Devebaugh & Smith* 3 Binn. 175.

(3). Act of February 8, 1768, 2 Smith's Laws, 124.

## CHAPTER VII.

ACQUISITION OF TITLES OTHER THAN  
THROUGH THE LAND OFFICE AND BY IM-  
PROVEMENT.

While most titles within the Province were acquired through the Land Office or by improvement, there were others arising from special circumstances which gave them credit and effect.

Among these may be mentioned those arising under military permit. Along the roads leading through the territory of the Indians, it was customary for the military authorities to grant permits to a few adventurous colonists to lay off a tract of land and build a house, that aid and comfort might be given to soldiers traveling along those roads. No other title was necessary than the permit issued by the military authorities, provided it was followed by actual settlement.

A mere promise, in 1749, by Richard Peters, Secretary of the Land Office, to a trespasser, to induce him to move off the unpurchased land that when the land should be purchased from the Indians, the place should be secured to him, has been considered as entitling such a person to a preference after the purchase.

Owing to the uncertainty of the boundary lines between Pennsylvania and Maryland, settlers from each of these provinces took up and improved claims which they afterwards found to be a part of the other province. In the final treaty between these provinces it was mutually

agreed to respect the rights gained by settlers from their respective governments. Hence arose a peculiar local title upon which many claims were based.

This same difficulty arose between Pennsylvania and Virginia and similar arrangements were entered into, which resulted the same as those entered into between the province of Pennsylvania and Maryland giving rise to another peculiar title.

Another species of title arose under certain licenses granted by one Samuel Blunston. It appears that those wise and just laws maintained by William Penn, which prohibited settlements on lands not yet purchased from the Indians, were relaxed when his sons acquired the Proprietary interest. And we find in 1733-4, a commission was issued to Samuel Blunston to grant licenses to settle and take up lands on the west side of the Susquehanna. These lands not having been purchased from the Indians, the Land Office was not open for their disposal. The licenses issued by Samuel Blunston, the Proprietaries were bound to confirm, being issued by their express consent, as soon as they purchased the lands from the Indians. They were peculiar in two respects. First, they were issued for lands not purchased from the Indians, and second, they formed a distinct species of land title, containing all the essential parts of a warrant except that in no instance was the purchase money paid when they were issued (1).

The issuing of these licenses, however, was due not so much to a desire to encroach on the territory remaining in the possession of the Indians as to counteract the encroachments of settlers from Virginia who were advancing rapidly on the west side of the Susquehanna. A

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(1). *Dunning's Lessee v. Caruthers*, 4 Yeates 17.



mere order from the Secretary of the Land Office and Receiver-General to Surveyor-General's deputy without the formal warranty was sufficient to authorize a location of land and give title (1).

It also appears that the practice was very common of permitting surveys to be made without any warrant or order, either by connivance of the officers or consent of the Proprietaries. This gave rise to a "Warranty of Acceptance" which usually recited. "Whereas, By our consent and direction a survey was made, etc.," and then requiring the survey to be accepted (2).

Another practice was resorted to in 1762, which gave rise to much irregularity. This was to issue certificates of warrants having been issued, when, in fact, no warrant was issued or any purchase money paid; and, on these certificates, surveys were made without any authority or direction from the Surveyor-General.

In 1719 and 1720, we find warrants issuing on settlement said to have been made upon agreement previously made; a distinct matter from the surveys by consent or the certificates before mentioned.

But all these irregular practices were terminated in 1765 by the Proprietary instructing deputy surveyors, not to survey on any ticket or order from any person other than the Surveyor-General.

Another mode adopted for conveying title was by lottery, the plan of which was published in 1735. This was a scheme for disposing of 100,000 acres by issuing 7,750 tickets at forty shilling each. This scheme was not carried out, however, as the tickets failed to be disposed of.

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(1). *Fothergill vs. Stover*, 1 Dallas 6.

(2). 2 *Smith's Laws*, 147.

## CHAPTER VIII.

## TITLE OF THE COMMONWEALTH.

The circumstances which put an end to the title of the Proprietaries gave to the Commonwealth title to lands in Pennsylvania. Those circumstances were the Revolution and the Divesting Act of 1779. The Revolution put an end to the political supremacy of the Proprietaries and transferred the sovereignty from the Crown to the people in their representative capacity, the Commonwealth. The Divesting Act of 1779, the consideration having been accepted, transferred to the Commonwealth the title to lands yet unappropriated.

Prior to the passage of the Divesting Act, the Assembly made inquiries as to the nature of the Penn title as well as to the legality of the reservation of quit rents. Inquiries were made of Chief Justice McKean. But here they failed to receive much encouragement. He promptly responded that he was of opinion that Penn's title was an absolute one, free from all trusts for the benefit of settlers; that the "conditions and concessions" to "First purchasers" concerned only themselves and did not affect the imposition of quit rents on others (1).

Another direction in which the Assembly sought information was through a committee appointed to consider and report on the same subject. The conclusions submitted by the committee were directly opposed to the views expressed by Chief Justice McKean, but were more in sympathy with the spirit of the Assembly.

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(1). 10 Haz. Hist. Reg. of Penna. 114.

The committee reported that the grant to William Penn "was and ought to be considered as containing a public trust for the benefit of those who should settle in the State of Pennsylvania, coupled with a particular interest accruing to the said William Penn and his heirs, but in its very nature and essence to the great and general purposes of society mentioned in the said grant. That the re-establishment of the powers and claims of the heirs of Penn would be utterly subversive of the rights, safety and happiness of the good people of this State." They concluded further that Penn, by his "conditions and concessions" to the first settlers had established no right to reserve quit rents and that such rents were therefore "badges of slavery and reserved without just authority." They recommended, therefore, that the estates of the late Proprietaries other than the quit rents arising from lands allotted to servants at the end of their servitude, and the reserved lands known as Proprietary tenths or manors and such purchases as were made by them in their private capacity, be vested in the Commonwealth and that all quit rents other than those before mentioned be forever abolished (1).

On the 27th of November, 1779, the Assembly took action upon the report of the committee by the passage of the Divesting Act. This Act recited that the charter to William Penn was granted and held for the great ends of enlarging the bounds of human society; that the powers of government were stipulated to be used as well for the benefit of the settlers as for himself; that the claims of the Proprietaries cannot longer consist with the safety, liberty and happiness of the good people of this Commonwealth; that the safety, liberty and happiness

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(1). 10 Haz. Hist. Reg. of Penna. 118.

of the people are the foundation law of society, and it has been the practice and usage of states most celebrated for freedom and wisdom to abolish all claims inconsistent therewith; that it is the right and duty of the representatives of the people to assume the direction and management of such interest and property as belongs to the community or was designed for their advantage; that it had become necessary that speedy and effectual measures should be taken in the premises; and it enacted that every estate of the late Proprietaries be vested in the Commonwealth for the use and benefit of all its citizens, the disposal thereof being committed to the legislature, excepting those estates whereof they were possessed in their private capacity and likewise all the land in the Proprietary tenths or manors, duly surveyed and returned into the Land Office on or before July 4th, 1776; and excepting, also, all and every the title, right and estate to lands which had been granted by the Proprietaries or their officers duly appointed by virtue of any deed, patent, warrant or survey, or location filed in the land office on or before July 4th, 1776, all of which titles were thereby confirmed.

All quit rents were abolished except those reserved in the Proprietary tenths or manors. Arrears of purchase money, except for parts of manors, were also made payable to the Commonwealth.

This act also recited that the freemen of the Commonwealth being desirous to manifest not only a regard for their own safety and happiness, but also their liberality and remembrance of the enterprising spirit of the founder of the Commonwealth and mindful of the expectations and dependence of his descendants and that sundry marriage settlements and testamentary dispositions made

thereon which would be defeated and the parties subject to disappointment and loss, it provided for paying them £130,000 sterling, which sum was afterwards duly paid to the proper claimants (1). This act also provided for delivering up to the State, the books and papers of the Land Office.

As was said before this act was at one time seriously questioned by able jurists, but time and circumstance has removed all practical objections.

The lands yet remaining in the possession of the Indians within the charter limits of Pennsylvania at the termination of the Proprietary government were purchased from them in 1784-5 (2).

Of the land subsequently acquired by the Commonwealth, the purchase of a large tract in Erie county containing over 200,000 acres (3), may be mentioned. This land was not within the charter bounds of the Province as definitely settled. This tract was part of the territory ceded to the United States by New York and Massachusetts and was purchased from the United States in March, 1792, for \$151,640.25. The Indian cession is dated 1789 (4).

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(1). *Penn vs. Penn*, 2 Yeates 550.

(2). *Infra* p. 8

(3). 2 Jones on Land Office Titles, 209.

(4). 2 Smith's Laws 124.

## CHAPTER IX.

## TRANSFER OF THE COMMONWEALTH'S TITLE.

From the passing of the Divesting Act, in 1779, until the year 1781 the Land Office was closed and no action was taken by the Legislature on the subject. On the 9th of April, 1781 (1), the first Act of Assembly was passed establishing a Land Office, and holders of uncompleted titles were enabled to pay the purchase money to the State and obtain patents, but as yet no provision was made for the disposal of vacant lands. By the Act of April 5, 1782 (2), a Board of Property was instituted to hear and determine all controversies affecting rights and titles to land which theretofore had, or thereafter may have, arisen in transacting the business of the Land Office. It was not until 1784 that the Legislature thought proper to authorize the sale of vacant lands (3). Hitherto provision had been made merely for the completion of titles formerly commenced, the fulfilment of engagements made during the war to officers and soldiers, and the organization of agents to accomplish these objects. After the treaty of peace was signed with Great Britain, however, it was deemed expedient to expose for sale the remaining lands of the Commonwealth which had formerly been purchased from the Indians. The act for this purpose was passed April 1, 1784 (4). It empowered the officers of Land Office to receive applications, grant warrants, order

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(1). 1 Smith's Laws 529.

(2). 2 Smith's Laws 13.

(3). Sergeant's Land Laws 74.

(4). Sergeant's Land Laws 74.

surveys and issue patents as "heretofore, agreeable to the former customs and usages of the Land Offices."

By the wording of these Acts, the whole land system under the Commonwealth became identified with that which had existed in Pennsylvania since its settlement. Applications were made, warrants issued, surveys ordered and patents were granted. Caveats were filed for instituting proceedings before the Board of Property as under the Proprietaries. Instead, however, of the Proprietary signing warrants and patents, various acts of Assembly prescribed who shall do so. Modifications were afterwards introduced but the general outline was substantially preserved and continued.

By the Act of March 29th, 1809 (1), the office of Receiver-General was abolished and the duties transferred to other offices. The books, papers and documents in the Receiver-General's office were transferred to the Secretary of the Land Office, the State Treasurer thereafter to receive the purchase money for lands sold and fees upon the issuing of warrants and patents. By the Act of 1843 (2), the office of the Secretary of the Land Office was abolished and its duties assigned to the Surveyor-General, and this office was, in its turn, abolished by the new Constitution and the duties transferred to the Secretary of Internal Affairs. The Secretary of Internal Affairs succeeded to the duties of Surveyor-General the first Tuesday of May, 1875 (3). According to the annual report of the Secretary of Internal Affairs for 1890 the Department of Internal Affairs contains six bureaus, one of which being the Land Office. Speaking of this bureau the report says: "In this bureau are filed the applications for vacant land,

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(1). P. L. 122.

(2). P. L. 324.

(3). Report of Secy. of Interior for 1875.

the duplicate warrants on which the surveys are made, the draft or return of the deputy surveyor, the deputies' lists, the returns of the Surveyor-General to the Secretary of the Land Office, the records of the patents, the vouchers showing the payment of the purchase money, and all records regarding land titles in the Commonwealth. The making of certified copies of all original papers, together with the consideration of the applications now being made for vacant lands, constitute the work of this bureau."

Thus, it will be seen the essential features of the early Land Office are still preserved and are in use at the present day. Applications are still received, warrants granted, surveys ordered and patents issued. But while undoubtedly there yet remain vacant lands, heretofore unappropriated, the officers of the Land Office invariably refuse to answer affirmatively the oft repeated question put to them as to whether vacant land remains in Pennsylvania, but leave it entirely to those who, after investigation decide to pay the price and run the chances of a vacancy. This uncertainty has resulted from the loose way of disposing of the public lands from the earliest colonial days. Speaking of the loose disposition of public lands in Pennsylvania by way of apology for the continued refusal to reply affirmatively to the question of whether there is vacant land in Pennsylvania, the Secretary of Internal Affairs, in his annual report for 1890, says: "The disposition of the public lands in Pennsylvania has differed materially from the plan pursued by the Government of the United States. Usually, the United States lands were surveyed before applications were received from purchasers and the lines were clearly defined. Where they could not



be indicated by marking timber, they were defined by well-established corners, so that the applicant for government land knew before making the application, the exact limits of the tract and its general features. In the management of the Land Office of Pennsylvania, under the Proprietaries, a different policy was pursued. When application was made for land a warrant was issued," which was often indescriptive, authorizing "the deputy surveyor or Surveyor-General to cause the number of acres called for in the application to be surveyed out of any unappropriated land of the Commonwealth, no definite location being given. In many cases the surveyors located warrants throughout the Commonwealth, according the wishes of the applicants. In a very large portion of the territory, no regular system prevailed as to the conformation of the tracts, and the warrants being executed by different surveyors (who, in many cases, run only one or two lines of a tract) numerous interferences resulted and strips of vacant lands between tracts were frequently left. As a result of this plan in the location of warrants—it is difficult to ascertain from the records here whether land applied for is vacant or not. Hence, the Department, the Surveyor-General, and others in authority in the Land Office do not assume to represent any land as being vacant but leave it entirely to those who, after investigation, decide to pay the nominal price charged for unappropriated land and take the chances of a vacancy" (1).

It has been regretted that Penn did not adopt the plan subsequently pursued by the United States in the disposal of public lands. But he had not then the experience to guide him nor were his means very competent to bear the expense. The plan pursued by Penn was the

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(1). Report of Secy. of Internal Affairs (1890) A 11 & 12.

one previously existing in his Province and in the neighboring colonies (1).

However, that unappropriated land still remains in Pennsylvania there is no doubt. Applications are still made, warrants granted and patents issued. During the year ending November 30, 1890, ninety-six applications were received and forty-two warrants were granted for which the State received over \$2,000 as purchase money" (2).

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(1). Sergeant's Land Laws 84.

(2). Report of Secy. of Internal Affairs, A8, 1890.

## CHAPTER X.

## TENURES IN PENNSYLVANIA.

A thesis on land titles in Pennsylvania would be far from complete without a chapter on that perplexing subject, "tenures in Pennsylvania." Although the weight of authority seems to favor their existence at the present day, yet the question is by no means a settled one. Two of our most recent authorities (1) reason in opposite directions on this question, and each supports his argument by citations of unquestionable authority. Possibly the remark of Mr. Wright when discussing the equally difficult question, whether feudal tenures existed in England prior to the Norman conquest, is equally applicable to the present question. He said, the authorities on both sides of that question were numerous, yet he would mention the principal ones that the reader might see that bare authority ought to have little or no influence on his judgment and that "he may in this case, without vanity or danger of censure, lean unto his own understanding" (2).

But whether any remnants of tenure exist or not, says Professor Mitchell, it is certain that our law of real property has its root in the feudal system and "it is impossible to comprehend it without a knowledge of tenure" (3). Mr. Justice Sharswood (4) says he regards the law of

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(1). Cadwalader on Ground Rents; Jackson & Gross, L. & T.

(2). Wright on Tenures 46.

(3). Mitchell 79.

(4). Law Lectures 200.

tenures as lying at the very foundation of all sound legal knowledge. Professor Mitchell and Mr. Justice Sharswood both held the view that tenures do exist in Pennsylvania and have existed since the advent of the English.

But before entering into the merits of this discussion let us understand the meaning of "tenure." The word "tenure" is derived from the Latin "tenere," which means "to hold." Lord Selborne, 1883, citing *Co. Lit.* 65 a., said: "All land in England in the hands of any subject, was holden of some lord by some kind of service and was deemed in law to have been originally derived from the Crown" (1). Now this "holding of some lord by some kind of service," is what is meant by "tenure." Tenure is so closely connected with the idea of property in England that Chancellor Kent said, "there are no lands (in England) to which the term 'tenure' does not strictly apply" (2).

There seems no doubt then but that long before, long after and at the time of William Penn, all lands in England were held mediately or immediately of the King, who was lord paramount; and every parcel of land was held by some species of tenure. The common tenure at the time of William Penn being socage tenure, to which all tenures (with a few unimportant exceptions) were reduced by 12 Charles II (3). Blackstone, speaking of tenures, says "socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service" (4).

Let us then look at the introduction of the Proprietary government and titles acquired thereunder and there-

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(1). *Atty. Gen. of Ontario vs. Mercer* 8 App. Cases 771.

(2). 3 Kent's Com. 487.

(3). Mitchell. 87.

(4). 2 Blk. Com. 79.

after to see if tenure did not continue incidental to all land titles.

The charter of Charles II granted the province to William Penn, his heirs and assigns forever, to be holden of Charles II, his heirs and successors, Kings of England, as of his castle of Windsor, in free and common socage, by fealty only for all services, yielding and paying two beaver skins to be delivered yearly at Windsor castle, and reserving to himself and his successors the sovereignty of the province and one-fifth of all the gold and silver ore which might from time to time be discovered within its boundaries.

By virtue of this charter, William Penn became feudal lord of the soil in Pennsylvania. Speaking of the 3d, 17th, 18th and 19th sections of the charter, Mr. Justice Sharswood said: "They settle, as far as language can settle anything, that Penn held of the Crown, in free and common socage—as of the castle of Windsor—and that his grantees were tenants under him in like socage; and that such grantees or tenants might also make grants and feoffments to be holden of them, the statute of quia emptores terrarum, which forbade sub-infeudation in England, being expressly declared not to extend to the province" (1).

There seems little objection to the admission that at the introduction of the Proprietary government and up to the revolution all titles in Pennsylvania were feudal in their nature and tenure was incident thereto (2). Indeed, Mr. Justice Sharswood says: "All agree that tenures existed before the Revolution" (3); and Professor Mitchell says: "Tenures certainly did exist here prior to the

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(1). Law Lectures, 179.

(2). Jackson & Gross, L. & T., 10.

(3). 2 Blk. Com. 77 n.

Revolution, and, it is believed, no lawyer ever questioned it" (1). But the Declaration of Independence, the passage of the Divesting Act and the Act of 1781 establishing the Land Office gave rise to much learned and interesting discussion. The question being whether under such legislation, the tenures had not expired and lands were not held allodially (2). Ranging on each side of this question were judges and jurists representing the highest legal talent in the State.

If title to lands were feudal, tenure existed, and rents reserved in conveyances are rents service, and the right to distrain, independent of any clause in the lease, exists as an incident of the tenancy. If, on the other hand, title to lands is allodial, tenure does not exist, and rents must either be in the nature of rents charge, when the right to distrain is expressed in the lease, or rents-seck, when the right to distrain is statutory.

That our titles are allodial and not feudal is expressly decided by Mr. Justice Woodward in *Wallace and Harmstad* (3). Mr. Justice Woodward there says that the Revolution (1776), the Divesting Act (1779) and the Act of 9th April, 1781, establishing the Land Office, "emancipated every acre of the soil of Pennsylvania from the grand characteristics of the feudal system." This conclusion reached by Mr. Justice Woodward finds support in the opinions of C. J. Gibson, C. J. Tilghman and Justices Breckenridge, Huston and Cooper (4).

In opposition to the opinion of Mr. Justice Woodward the most prominent authority is Chief Justice Sharswood, who discusses the subject of tenures with profound

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(1). *Mitchell*, 77.

(2). *Price on Real Estate*, 3.

(3). 8 *Wright* 492.

(4). *Jackson & Gross*, 7.

scholarship and pre-eminent ability in his lectures on the common and feudal law, delivered before the University of Pennsylvania while professor of the institute of law (1). Mr. Justice Sharswood says: "The better opinion appears to be that tenures still exist" (2). He further holds that the case of *Ingersoll vs. Sergeant* (3) not only established that the statute of *Quia Emptores* was not in force in reference to any lands in the colony but also that the relation of tenure exists and has always existed in Pennsylvania (4).

The conclusions of Mr. Justice Sharswood receive support in whole or in part from C. J. Gibson, Justices Kennedy, Duncan, Sergeant, Bell, Rogers, Breckenridge, President Judge Grier, Judge Joel Jones, William Rawle (5), E. Coppee Mitchell (6) and Richard M. Cadwalader (7).

The opinions referred to above wherein the respective views of Mr. Justice Woodward and Mr. Justice Sharswood find support are in most cases mere dicta and sometimes even doubtful and inconsistent as evidence by reference some to them as supporting both of these opposing views. Mr. Justice Sharswood said it was difficult to reconcile C. J. Gibson with himself (8).

Of the several effects of the Declaration of Independence, the Divesting Act and the Act of 1781 establishing a Land Office on land titles in Pennsylvania a few words may be said.

The State, by the Declaration of Independence, threw off the allegiance to the Crown and established the sov-

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(1). Jackson & Gross, L. & T., 7.

(2). 2 Blk. Com. 77, n.

(3). 1 Wharton 337.

(4). Law Lectures, 180.

(5). Jackson & Gross, L. & T., 8.

(6). Mitchell on R. E. 77.

(7). Cadwallader on G. R., 60.

(8). Law Lectures, 204.

ereignty of the people. The people, in their representative capacity, became lord paramount in place of the Crown while the Proprietaries still continued mesne lords as to the grantees, but became feudatories of the Commonwealth, just as in England during the days of Cromwell, the tenure of land was held by the Commonwealth (1), but the tenure itself was not changed. The people rid themselves of their King and confided the sovereignty to a new ruler but did not abolish tenure. So, in Pennsylvania, the people threw off the sovereignty of the Crown and established the sovereignty of the people but did not abolish tenure.

By the operation of the Divesting Act, the two estates, that of lord paramount and mesne lord, came together and the mesnality was merged. The sub-tenant of the mesne lords became the tenant of the chief lord, the people in their sovereignty capacity, and the tenure was preserved. The Commonwealth merely succeeded to the rights of the Proprietaries for a valuable consideration, which being duly accepted removed all practical objection to the validity of the act.

Ingersoll vs. Sergeant, twice argued by the ablest counsel then at the Philadelphia bar, and defended in the law lectures of Mr. Justice Sharswood, has always been considered authority for this position (2).

As to the effect of the Act of Assembly for the establishment of the Land Office under the Commonwealth, the very Act itself gave the form of a patent, in which there is a direction to insert the tenure and reservation.

Jackson and Gross, in their work on Landlord and Tenant, 1882, argue that the Divesting Act did of itself, with the acceptance of the consideration by the Penn

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(1). Sharswood's Law Lectures 213.

(2). Cadwalader, 49.



family, produce a change in tenures and although titles acquired theretofore are held feudally, those subsequently acquired, are allodial (1). This view Mr. Justice Sharswood adverts to only to reject and declares this Act produced no change in the tenure of lands in Pennsylvania (2).

In concluding the subject of tenures a few words should be said of the erection of manors within the province.

The nineteenth section of the charter to William Penn empowered him, and those he might license, to erect manors with a court baron, and court leet, thus engrafting some of the features of a feudal nobility upon our provincial institutions. And, indeed, William Penn seems to have contemplated the exercise of this power, for, on his last visit to the province, he executed an agreement with one Martin Zeal to let him have fifty acres in his manor of Pennsbury, "holding of the said manor, and under the regulations of the court thereof when erected." And shortly after he executed a commission to his Commissioners of Property giving them power to erect manors with jurisdiction annexed thereto, as fully as he could do by charter. But when occasion came to exercise this power the Commissioners declined to exercise it, and although every grant of land under the Proprietary government was nominally declared in the patent to be held for a certain manor, yet no manor courts and no manors were in the technical sense erected, and the tenure of lands within these so-called manors was exactly the same as elsewhere (3). What were termed Proprietary manors or tenths were only nominal manors. They were

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(1). Jackson & Gross, L. & T., 11.

(2). Law Lectures 188.

(3). 2 Smith's Laws 140.

nothing more than reservations by the Proprietaries from time to time, of lands which they appropriated to their own use, as they had a right to do. The Divesting Act of 1779 reserved to the Proprietaries all such Proprietary tenths or manors.

# INDEX.

---

|                                                                  | Page.              |
|------------------------------------------------------------------|--------------------|
| <b>ACCEPTANCE</b> , warrant of, .....                            | 33                 |
| <b>ALLOWANCE</b> of six per cent. for roads and barrens, .....   | 23                 |
| of four per cent. for variation in surveys, .....                | 23                 |
| <b>APPLICATIONS</b> , definition of, .....                       | 23                 |
| must be in writing, .....                                        | 19, 21             |
| where to be made, .....                                          | 19, 21             |
| inception of title when duly pursued, .....                      | 26                 |
| accepted at present day, .....                                   | 22, 26             |
| <b>BLUNSTON'S SAMUEL</b> , licenses to settle lands, .....       | 26                 |
| <b>BOARD OF PROPERTY</b> , creation of, .....                    | 17                 |
| how constituted, .....                                           | 17                 |
| proceedings before, .....                                        | 18                 |
| not a judicial tribunal, .....                                   | 18                 |
| power to withhold patent, .....                                  | 24                 |
| could not vacate patent, .....                                   | 24                 |
| under the Commonwealth, .....                                    | 26                 |
| <b>CAVEAT</b> , its purpose and effect, .....                    | 18                 |
| <b>COMMISSIONERS OF PROPERTY</b> , their powers and duties,..... | 16                 |
| <b>DIVESTING ACT</b> , when passed, .....                        | 14                 |
| circumstances of its enactment, .....                            | 32, 33             |
| effect of, .....                                                 | 14, 32, 33, 34, 46 |
| validity of, .....                                               | 14, 35             |
| <b>DISCOVERY</b> , law of, .....                                 | 1                  |
| fact of, .....                                                   | 4, 5               |
| <b>DUKE OF YORK</b> , title of, .....                            | 6, 8, 9            |
| release of title to William Penn by, .....                       | 12, 13             |
| <b>ERIE PURCHASE</b> , .....                                     | 26                 |
| <b>FIRST PURCHASERS</b> , titles of, .....                       | 15, 16             |
| <b>IMPROVEMENT</b> , acquisition of title by, .....              | 26                 |
| origin or doctrine, .....                                        | 26, 27             |
| doctrine of, recognized before the Revolution, .....             | 26                 |
| requisites of, as basis of title, .....                          | 26                 |
| not of itself sufficient to make title absolute, .....           | 26                 |
| sufficient to sustain ejectment, .....                           | 27                 |
| sufficient for purposes of taxation, .....                       | 27                 |
| not applicable to lands unpurchased from Indians,.....           | 26                 |
| similar to "Settlement," .....                                   | 28                 |

|                                                              | Page.                 |
|--------------------------------------------------------------|-----------------------|
| <b>INDIANS, rights of, .....</b>                             | <b>1, 2</b>           |
| covenants by William Penn to extinguish rights of,.....      | 15                    |
| purchases from, .....                                        | 2, 3, 35              |
| evidences of purchases from, .....                           | 3, 4                  |
| Proprietary's exclusive right to purchase from,.....         | 4                     |
| <b>LAND OFFICE, creation of, .....</b>                       | <b>17</b>             |
| how constituted, .....                                       | 17                    |
| always open (before Revolution), .....                       | 17                    |
| closed from 1779 to 1781, .....                              | 26                    |
| acquisition of title through, .....                          | 19, 20, 21            |
| irregularities existing in, .....                            | 19, 20                |
| under the Commonwealth, .....                                | 36, 37                |
| office of Secretary abolished, .....                         | 37                    |
| becomes a buereau in the Department of Internal Affairs,.... | 37                    |
| essential features preserved to present day, .....           | 38                    |
| <b>LONDON COMPANY, grant to, .....</b>                       | <b>12</b>             |
| <b>LOTTERY, scheme of .....</b>                              | <b>31</b>             |
| <b>MANORS, .....</b>                                         | <b>47, 48</b>         |
| <b>MARYLAND, boundaries between Pennsylvania and, .....</b>  | <b>11, 12, 29, 30</b> |
| <b>MASON AND DIXON'S LINE, .....</b>                         | <b>12</b>             |
| <b>MILITARY PERMITS, nature of, .....</b>                    | <b>29</b>             |
| <b>PATENTS, definition of, .....</b>                         | <b>24</b>             |
| when to issue, .....                                         | 20, 21                |
| by whom signed, .....                                        | 16, 37                |
| not conclusive evidence of title, .....                      | 24                    |
| obtained by fraud, .....                                     | 26                    |
| effect of issuing, .....                                     | 24                    |
| issued at present day, .....                                 | 28                    |
| <b>PENN, WILLIAM, grant of province to, .....</b>            | <b>11</b>             |
| title of, .....                                              | 13, 14                |
| purchases from the Indians, .....                            | 2, 3                  |
| nature of tenancy by, .....                                  | 43                    |
| death of, and transmission of title, .....                   | 14                    |
| <b>PLYMOUTH COMPANY, grant to, .....</b>                     | <b>12</b>             |
| <b>QUIT RENTS, abolished, .....</b>                          | <b>24</b>             |
| <b>RECEIVER GENERAL, creation of office of,.....</b>         | <b>17</b>             |
| abolishment of office of, .....                              | 37                    |
| <b>REVOLUTION, effect of, .....</b>                          | <b>14, 32, 45, 46</b> |
| <b>SETTLEMENT (see IMPROVEMENT).</b>                         | <b>..</b>             |
| forbidden on lands unpurchased from the Indians,.....        | 28                    |
| <b>SURPLUS, ten per cent., allowed,.....</b>                 | <b>23</b>             |
| new survey required when, in excess of ten per cent.,.....   | 23                    |
| excess of ten per cent. permitted without new survey,.....   | 23                    |
| statutes regulating, after the Revolution, .....             | 24                    |
| <b>SURVEY, when ordered, .....</b>                           | <b>20, 21</b>         |
| <b>SURVEYOR GENERAL, creation of office of, .....</b>        | <b>17</b>             |
| abolishment of office of, .....                              | 37                    |

|                                                                          | Page.       |
|--------------------------------------------------------------------------|-------------|
| <b>TITLE TO LAND</b> , definition of, .....                              | 1           |
| origin of, in Pennsylvania, .....                                        | 1           |
| transfer of, before Proprietary government, . . . . .                    | 7, 8, 9, 10 |
| acquisition of, by William Penn, .....                                   | 11          |
| by "First Purchasers," .....                                             | 15, 16      |
| acquired through Land Office, .....                                      | 19, 20, 21  |
| by improvement, .....                                                    | 26          |
| under military permit, .....                                             | 29          |
| based on promise of Secretary of Land Office, .....                      | 29          |
| in disputed territory along Maryland and Virginia bounda-<br>ries, ..... | 29, 30      |
| by license of Samuel Blurston, .....                                     | 30          |
| founded on mere order without formality of warrant, .....                | 31          |
| by warrant of acceptance, .....                                          | 31          |
| acquisition of, by Commonwealth, .....                                   | 32          |
| transfer of, by Commonwealth, .....                                      | 36, 37, 38  |
| <b>TENURES</b> , definition of, .....                                    | 42          |
| whether they exist in Pennsylvania at the present day, . . . .           | 41-47       |
| not disputed they existed before the Revolution, .....                   | 43, 44      |
| <b>VIRGINIA</b> , boundary between Pennsylvania and, .....               | 30          |
| <b>WARRANTS</b> , definition of, .....                                   | 22          |
| by whom signed, .....                                                    | 16, 37      |
| when to be issued, .....                                                 | 20, 21      |
| originally not descriptive, .....                                        | 22          |
| title acquired under, .....                                              | 22, 23      |
| of re-survey, .....                                                      | 23          |
| of acceptance, .....                                                     | 30          |
| certificates of, having issued, .....                                    | 31          |
| upon settlements made under previous agreement, .....                    | 31          |
| granted at present day, .....                                            | 38, 40      |



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## NOTES.

The recently printed proceedings of the meeting for 1894 of the American Bar Association give prominence to the Law School of the University of Pennsylvania as the originator of the Law Dispensary. This method of teaching the details of practice, which has been in operation in Philadelphia for quite a long time, was brought to the attention of the Association's Committee on Legal Education over a year ago, and a request was then made for a full account of the origin, features and results of the Dispensary. This account was afterwards read at the meeting of the Association at Saratoga.

The interest taken in the subject by the Committee on Legal Education has since been confirmed by the recent establishment of a somewhat modified dispensary at the Harvard Law School. Professor Wambold has undertaken the experiment at Cambridge and has enlisted a number of the law students in the work, among them

Justin D. Bowersock, treasurer of the Harvard Law Review. No attempt has yet been made to bring the Harvard Dispensary to the notice of the general public through the columns of the press. The members rely for "subjects" upon the beneficiaries of a well known Cambridge charitable association. So far the cases coming up for discussion do not seem to have presented the variety of question that have been disclosed by the experiment at Philadelphia. At Harvard no case has, as yet, been taken into court, the members contenting themselves with chamber advice given to such applicants as present themselves, under the moderation of Professor Wambaugh or of one of his colleagues. It is proposed, during the next college year, to open an office in Boston for the purpose of carrying on the work.

In view of the mutual interest displayed just at present by American and English college students in each other some brief account in the pages of the Pennsylvania Law Series of some of the English legal debating clubs will not be without interest.

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Through the kindness of Professor Richard G. Moulton, of the University of Chicago, formerly of Cambridge, England, we have received a number of pamphlets containing syllabi of meetings, constitutions and by-laws, annual reports, etc. These include accounts of the Sheffield and District, Nottingham, Leeds, Bradford, Hull and Plymouth, Stonehouse and Devonport Law Students' Societies and the Law Students' Debating Society of London.

The Plymouth, Stonehouse and Devonport Society admits as active members "gentlemen engaged in the study of the law, with a view to being called to the bar or admitted as solicitors." The Sheffield and District Society



cause of action, and damages assessed and recovered in respect to it, though the time for performance may yet be remote." This statement of the rule is broad and comprehensive and involves a principle that is said by Cockburn, C. J., to be an essential element of every contract. It holds the inviolate continuance of the relation that is said to be created eo instanti with the formation of every contract, to be of as much importance as the performance itself and, therefore, gives to any act that impeaches it, in any way, the same efficacy in affording a positive and immediate redress as it does to the failure of performance, the only obligation imposed by the formal terms of the promise. It excludes performance at the appointed time and so makes the renunciation a virtual non-performance and draws to it all the consequences that could attach upon such a breach.

Its effect is to add one more right to one party to a contract against another who has renounced his obligation before the time for performance. The right to be discharged from his contract immediately upon a renunciation and the right to an action for breach when performance became due, were previously recognized; by this case a third and more expeditious remedy by an immediate action was introduced.

Therefore, to sum up the position of the injured party:

- (i.) The promisee is discharged from the performance of his part of the contract.
- (ii.) He may at once bring an action for a breach and recover damages to the same extent as for non-performance.
- (iii.) He may refuse to treat the renunciation as putting an end to the contract and await the time for performance to bring his action.

(2.) The two cases we have been discussing have given a full enunciation of the reasoning upon which the rule in *Hochester vs. De la Tour* is founded and the effects that attend its adoption; we will now proceed to the conditions upon which its application in a given case has been determined to depend.

We have seen that Cockburn, C. J., in his decision in *Frost vs. Knight*, put it beyond question that no exceptions to the rule in *Hochester vs. De la Tour* could be created by any differences in the subjects of contracts; but cases have arisen in which it became necessary to decide whether circumstances, extrinsic to the subject matter of the contract, would obviate the application of the rule, and from these cases certain prerequisites to its enforcement have been established. These are:

(i.) The renunciation depended upon as a breach must be absolute and unequivocal.

(ii.) It must have been treated as a breach and discharge of the contract.

(iii.) It must go to the whole of the consideration of the contract.

(i.) The first qualification is approved and applied in the case of *Dingley vs. Oler*, 117 U. S., 490. This was an action of assumpsit to recover damages for breach of an agreement, whereby defendants undertook, in consideration of a certain amount of ice furnished them by plaintiffs in 1879, to return to plaintiffs the same quantity from their ice houses in 1880. In July, 1880, the plaintiffs requested the delivery of the ice, to which plaintiffs replied, July 7, "the price of ice being much higher than in the season of 1879 we must decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other par-

ties here or give you ice when the market reaches that point." July 10, plaintiffs renewed their demand for the ice and in answer, July 15, the defendants repeated their refusal but concluded, with an expression of hope that they might hear from plaintiff again in regard to an adjustment of the question or, preferably, have a personal interview. Upon a specific finding of facts by the Circuit Court, 11 Fed. Rep., 372, it was determined that although defendants had all of the shipping season of 1880 in which to return the ice, yet the letters of July 7 and 15 were tantamount to an absolute refusal to perform the contract and ship the ice any time during the season, and, therefore, the action could be maintained, though brought before its close. The Supreme Court reversed the Circuit Court upon the finding of facts. By the interpretation which it put upon the letters of July 7 and 15, neither one of them could be esteemed a final and absolute refusal to go on with the contract at all events. The alternative proposition attached to the refusal in the first letter and the expression of hope for future negotiations looking to a settlement in the second, were held to make the answers of such an equivocal nature as to prevent them from falling within the English doctrine of an anticipatory breach. The court adopted the rule upon this point deduced by Mr. Benjamin in his treatise upon the law of Sales: "A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise."

This qualification is also aptly illustrated in the facts of the case of *Johnstone vs. Milling*, L. R., 16. Q. B. D., 460, and is fully discussed in the opinions of the judges in rendering their decision.

(ii.) The second condition to the application of the doc-

trine of an anticipatory breach by renunciation is that the renunciation must be treated and acted upon as a discharge. It was upon this ground that *Avery vs. Bowden*, 5 E. & B., 714, which was decided soon after *Hochester vs. De la Tour*, was distinguished from the latter case. This was an action for breach of a charter party, whereby defendant had agreed to furnish and load a cargo on plaintiff's ship at Odessa. When the ship reached Odessa and the cargo was demanded, the agent of the defendant refused to supply one and repeatedly told the master of the ship he had no cargo for his ship and that he had better go away. But the master continued to require the cargo and before the days stipulated for the loading had expired war broke out between England and Russia and made the performance on the part of defendant legally impossible. It was held that, inasmuch as there had been no breach by failure of performance for the defendant had still a number of running days in which to load, and as the renunciation in advance had not been treated as a breach, the defendant was entitled to the benefit of the effect of a declaration of war in discharging him from performance of his promise. "The renunciation can not be considered as constituting a cause of action after the captain still continued to insist upon having a cargo in fulfillment of the charter party."

In the Pennsylvania case of *Zuck vs. McClure*, 98 Pa. St., 541, this same rule was applied. The plaintiff contracted to deliver an amount of coke to defendant between December 1 and May 31. On November 19, he wrote that he would be unable to perform his contract, but to this the defendant made no reply. November 29th plaintiff sued defendant for coke delivered on a previous order. December 4th defendant demanded the coke contracted for and notified plaintiff that he would elect to

rescind the contract, unless it was delivered at once. The coke was not shipped, and on the trial of the suit, instituted November 29th, defendant attempted to set-off damages for breach of the contract. It was held that the set-off could not be allowed, because the breach was not complete at the time suit was brought:—"By insisting upon performance December 4th the defendant kept the contract alive as to both parties up to that time, and on November 29th, when the action was commenced below, there was no breach of contract which defendant could set-off as to plaintiff's claim."

(iii.) The third condition which we have mentioned as necessary to the application of the rule is that the renunciation must go to the whole of the consideration of the contract. This statement has only a dictum in the case of *Johnstone vs. Milling*, L. R., 16 Q. B. D., 460, for direct authority; but since a breach by renunciation and by failure of performance are entirely analogous, the same rule that obtains in one should, it seems, be applied in the other. In *Johnstone vs. Milling* the question was whether, in a suit by a lessor against a lessee, the latter should be allowed a counter claim for damages for a breach of a covenant in the lease by the lessor. The lease was for twenty-one years, determinable by the lessee at the end of four years by six months' notice. The lessor covenanted to rebuild the premises after the expiration of four years upon six months' notice. Before the lapse of that time he told the lessee at different times that he would be unable to procure the money to rebuild. As a consequence, the lessee gave notice of an intention to determine the lease at the end of four years, but nevertheless he continued to occupy and pay rent until after the expiration of the four years, in the expectation that the lessor might yet be able to rebuild. It was held that

the failure of the latter to do so, gave no ground for setting off damages as for a breach of the covenant to rebuild, because what the lessor had said did not amount to a repudiation and that even if it did, the lessor had not acted upon it as such. But the court went further in the expression of its opinion, Lord Esher, M. R., saying: "The covenant in question is a particular covenant in the lease, not going to the whole of the consideration. If there were an actual breach of such covenant at the time fixed for performance, such breach would not, according to the authorities, entitle the tenant to throw up his lease. That being so, I do not hesitate, though it is not necessary, in this case, to decide the point, that an anticipatory breach could not entitle him to do so." Cotton and Bowen, L. JJ. expressed their concurrence with these views.

3. Having reviewed thus far the principle of the doctrine introduced in *Hochester vs. De la Tour*, its effect and the circumstances that create exceptions to its application, we will now briefly summarize the extent to which it has been recognized and adopted as a true expression of the common law.

In England, it has been approved and followed in numerous cases down to the late one of *Johnstone vs. Milling*, L. R., 16 Q. B. D., 460, where it was thoroughly reviewed. Therefore, it may be said to be in full force as an unquestioned rule of law throughout English jurisdiction.

The condition of American law upon the subject is, to a large extent, an undetermined quantity. The United States Supreme Court has taken notice of this feature of the English law, but has not, as yet, been called upon to render a decision in any case, the facts of which required an authoritative statement of its opinion upon the ques-

tion whether or not it is the rule of law within its jurisdiction. Neither has it taken occasion by way of dictum to intimate the position which it might assume, if occasion required it, unless the somewhat favorable mention of *Hochester vs. De la Tour* in *Smoot's Case*, 15 Wallace, 36, might be so construed. The case was ruled upon the ground that the facts depended upon as an anticipatory breach did not in reality constitute a renunciation. In the opinion, the court quotes the words of Baron Parke, in *Phillpotts vs. Evans*, upon the effect of a renunciation in advance of the time for performance, that "no action would then have lain for the breach of the contract, but that the plaintiffs were bound to wait until the time arrived for the delivery," and then remarked that "some of the judges in *Hochester vs. De la Tour* disapproved very properly of the extreme ground taken by Baron Parke." This statement seems to have been relied upon by counsel in the later case of *Dingley vs. Oler*, 117 U. S., 490, as a committal of the court in favor of the English rule. In the latter case, as we have already seen, the Supreme Court reversed the Circuit Court on the ground that the facts of the case did not warrant the application of the rule of *Hochester vs. De la Tour*. In regard to the latter, it was remarked that while it had been approved in a number of the States, it was denominated in a "novel doctrine" in *Roper vs. Johnson*, L. R., 8 C. P., 178, and has been disputed and denied in *Daniels vs. Newton*, 114 Mass., 590, and had never been applied in the United States Supreme Court. The court said it was unnecessary to discuss or decide whether the doctrine could be maintained, and gave no hint as to its inclination. The same attitude was maintained in the later case of *Rolling Mill vs. Rhodes*, 126 U. S., 255, where the court felt relieved from deciding whether a refusal in advance of

the stipulated time to receive goods contracted for might have been treated as a renunciation and breach, because the plaintiff did not act upon it. The present position of the court seems, therefore, to be entirely neutral, with no expressions upon which to base a prediction of its future action when occasion may call for a decision.

In the State courts the conditions are diverse; in a majority the question remains untouched, while the decisions in the others range from unqualified acceptance to absolute denial. In a number of States, cases have arisen calling for an expression of opinion, and the courts have not hesitated to adopt the English rule in all its rigor. Cases approving it are: *Halloway vs. Griffith*, 32 Ia., 409; *McCormick vs. Basal*, 46 Ia., 235; *Fox vs. Kilton*, 19 Ill., 519; *Dugan vs. Anderson*, 36 Md., 582; *Crabtree vs. Messersmith*, 19 Ia., 179; *Platt vs. Brand*, 26 Mich., 175; *Lee vs. Pennington*, 7 Bradw., 248; *James vs. Adams*, 16 W. Va., 245, and *Grau vs. McVicker*, 8 Biss., 1.

On the other hand, the Court of Massachusetts stands committed to uncompromising hostility to the English rule. In a remarkably strong opinion in *Daniels vs. Newton*, 114 Mass., 590, Wells, J., follows the lead of Chief Baron Kelly, L. R. 5 Exch., 332, in opposing the doctrine enunciated in *Hochester vs. De la Tour*, both upon the ground of authority and of reason. This was an action for breach of a written agreement to purchase land, brought before the expiration of the time for the purchase. In expressing his opinion that the action could not be maintained, Wells, J., said: "A renunciation of the agreement by declarations or inconsistent conduct before the time of performance may give cause for treating it as rescinded and excuse the other party from making ready for performance in order to enforce his rights. It may destroy all capacity of the party so disavowing its



obligations to assert rights under it afterwards, of the other party has acted upon such disavowal. But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject matter of the agreement. Until the time arrives, when to its performance he can suffer no injury or deprivation by the terms of the agreement, he is or might be entitled which can form a ground of damages. There is neither violation of rights nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory contract, the other party must show a refusal or neglect to perform at a time when and under conditions such that he is or might be entitled to require performance. Such undoubtedly, was the interpretation of the common law in all the earlier decisions." Of the proposition of Cockburn, C. J., in *Frost vs. Knight*, in regard to the inchoate rights of the promisee before the time for performance has arrived, Wells, J., remarks that it would apply with peculiar force to commercial paper, especially if its repudiation by the maker were made public. Yet he knew of no decision carrying the rule that far and doubted if the propounders of it would be willing to follow it to that extent.

Between these extremes in the decisions of the State courts upon the question, New York has been vacillating in its treatment of it, unwilling to take the position of Massachusetts and deny in toto the validity of the rule, it has not been ready to follow the other States in a full approval and acceptance of it. In *Burtis vs. Thompson*, 42 N. Y., 246, where an action was brought for breach of promise of marriage before the appointed time for the

performance of the promise, the plaintiff was held entitled to maintain the action. This decision would seem to involve the adoption of the rule in *Hochester vs. De la Tour*, as elaborated in *Frost vs. Knight*; but in view of subsequent decisions, it must be considered as limited in its authority to the fact of that case. For, in a later case, it was said that, while the English doctrine had received some countenance in previous decisions, it was not established as the law of the State; and in a still later case, *Shaw vs. Insurance Co.*, 69 N. Y., 286, the court declined to adopt it to the full extent. Other cases in which the court seems to incline towards the adoption of the doctrine, and which complicate the determination of the exact attitude of the court, are: *Freer vs. Denton*, 61 N. Y., 496; *Howard vs. Daly*, 61 N. Y., 374; *Canada vs. Wick*, 100 N. Y., 127.

In Pennsylvania, as in the United States court, the question is an open one, and the books contain no expressions that can be relied upon as unmistakable indications of the tendency of the court in respect to it. Perhaps, the language used by Justice Paxson, in *Zuck vs. McClure*, 98 Pa., 541, comes most nearly to an expression of opinion upon the subject. As we have seen, he found it unnecessary to decide upon the effect of the refusal in that case, in advance of the time for performance, because the promisee did not treat it as a breach; but the court took occasion to remark in the course of the opinion, that a notice of intended breach, if accepted and acted upon by the other party, may become a breach and adds that in this case "if the defendants had accepted the plaintiff's notice of breach and acted upon it, there would plainly have been a breach." While the word breach has been rendered rather ambiguous by the indifferent use made of it in the discussions of the subject of

renunciation, yet attaching to it its usual signification, the language used by the court points to an inclination in favor of the application of the English doctrine. The natural inference to be deduced from the opinion expressed and the conclusion which the court might be expected to have reached had it proceeded one step farther is that the party who had been guilty of a plain breach would have been liable to an immediate action by the other for the recovery of damages. Besides this apparent approval in the dictum of the Supreme Court, there is an outspoken statement of opinion in favor of the principle of *Hochester vs. De la Tour* in the case of *Mountjoy vs. Metzgar*, 12 Am. Law Reg., N. S. 442. But this was unnecessary to the decision of the case and was the expression of a lower court, so that it affords no authority for any predictions as to the temper of the court of last resort upon the subject.

In conclusion, we may say, as a result of the investigated authorities, that the uniform rule of law is that for a renunciation by one party before the time for performance, accepted and acted upon by the other, the latter is excused from performance of his part of the contract and may, when the time for performance arrives, bring an action for breach; that in the English jurisdiction he undoubtedly has the right to bring his action as for a breach immediately upon the renunciation, but that upon the latter subject, it cannot be said that there is any general rule in America. Although the greater number of courts which have passed upon it have adopted the English rule, yet in the United States court, as well as in a majority of the State courts, it is an open question. And in regard to those jurisdictions where no authoritative expression upon the question has been given, the future actions of the courts may be said to be prob-

lematical. For the influence which the English decisions would naturally have in determining their decisions is made a questionable matter in the face of the facts that they are undoubtedly in opposition to what was formerly considered the rule of common law, and that they have been strongly opposed by eminent authority, both in England and America. In these jurisdictions there are several alternative courses open to the courts. They may accept the English doctrine without any qualifications; second, they may adopt it in cases where they are convinced that the peculiar nature of the contract, as in a contract for marriage, does create a relation between the parties which invests them with inchoate rights before performance is due, the violation of which is, therefore, a breach of the contract, and at the same time reject it in other cases where they hold no such relation to have been created by the contract, and, thirdly, they may give a renunciation the effect of discharging the injured party from performance of his contract, and also of incapacitating the party renouncing his obligations from afterward electing to abide by his contract and from asserting any rights under it. All these courses have been advocated as justified by the nature of the contractual obligations and the adoption of any one of them would not be without the countenance of modern authority.

HORACE L. HENDERSON.

*Excerpt from*

may be entered by "any gentleman being a member of one of the Universities and bona fide studying for a degree in law, conferrable by the University of which he is a member, or who has served under articles of clerkship to a solicitor." The terms of membership of the Bradford Society are worded in this way: "Gentlemen keeping terms for the bar, or articulated to solicitors, and gentlemen whose articles have expired but who have not been admitted, are eligible as ordinary members." Several of the societies have honorary memberships greatly in excess of the "ordinary," or active list. In most cases meetings for debate seem to be held once a week. Joint debates are held at intervals by two similar societies, which are not always competitive between the clubs. For instance, the Halifax and the Bradford Law Students' Societies discussed jointly the question "Is free education conducive to the public welfare?" Mr. Dixon, of Halifax, and Mr. Mackrell, of Bradford, speaking for the affirmative, and Mr. Crabtree, of Bradford, and Mr. Ambler, of Halifax, for the negative. Several of the societies offer prizes, either in money or books, for the winning by their members of the high first or second class examination honors, and the Bradford organization bestows annual prizes to the best speaker, and the speaker who has made the most improvement during the session. Members, to qualify for these last prizes, must attend at least one-third of the ordinary meetings of the society. The latitude allowed in the choice of subjects for debate is one noticeable feature of the meetings, such questions as: Resolved—"That the working hours of artisans and laborers should be limited by statute to eight per day," and Resolved, "That this meeting welcomes free education and approves the

elementary education act," alternating with subjects of purely technical law.

The programmes of the meetings generally are printed in advance in neat pamphlets of a size small enough to readily go in the pocket.

# THE QUIZ.

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It is the general purpose of this department of the Pennsylvania Law Series to direct attention briefly to such changes as from time to time shall occur in the body of the law, either through new or different applications of the principles of the common law or by means of statutory enactments.

It is intended to accomplish this, by means of a carefully prepared system of questions and answers; the questions, where practicable, being obtained from some leading specialist in that branch of the law in which the change occurs and the answers presenting the reason, as well as the substance of the change.

**Discuss the Doctrine of Renunciation of Contract.**

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The subject of Discharge covers a large and important field in the law of Contract, involving difficult questions that have been much discussed; and the sub-division of Discharge that has, perhaps, been the most prolific of controversy is that of Breach. Of the modes of conduct by a party to a contract which have been held to constitute a breach, Renunciation of liabilities under it, is one, and of this method the last word has not yet been said. The question as to what legal effect shall be attached to a renunciation of obligations under a contract, whether or not such an act is a breach of the promise made by the contractor, and so discharges the contract and gives to the other party an immediate right of action to recover damages as for a breach, has been answered differently as the circumstances under which the renunciation has been made have differed; and to-day the common law affords no rule of universal adoption, applicable alike to all forms of renunciation. In some jurisdictions, a renunciation is esteemed a breach whenever made, and may be equally effective upon all occasions, certain requisites having been complied with, in discharging the contract and supplying grounds for immediate redress, while, in others, the question is either an open one or else the circumstance of the time at which the renunciation is made constitutes the determinative factor in a decision as to how far the contractual bond has been dissolved, and whether or not any present remedy exists.



In relation to the time of the performance of a contract, there are three possible occasions when a renunciation may take place:—

I. When there is a stipulated time for the performance of a contract, the obligor may wrongfully renounce it at the time performance is due.

II. During the course of the performance of a contract, one of the parties may renounce his further obligation under it.

III. When a contract according to its terms is not to be performed until some future time, one party may renounce it, in anticipation of that time, by notifying the other of an intention not to fulfill his promise when performance is due.

I. The first case needs no discussion further than to note the distinction between it and that other form of the discharge of a contract by breach—"failure of performance." Renunciation at the time when performance is due is an express refusal of performance; while "failure of performance" is a refusal to comply with the terms of the contract, implied from the fact of non-performance. So far as the writer is aware this distinction has never been noticed but it is conceived that a scientific distribution of the subject of the discharge of contract by breach requires it.

II. Renunciation during performance as a form of breach calls for little more than a citation of the leading case, for its authority is so well established and the principle underlying it so satisfactory, that it is recognized as a correct enunciation of the law upon the subject. On principle, it seems plain that when the duty under the contract is assumed and partly performed, and further obligations are due, the immediate performance of which

it is the right of the one party to demand, a disavowal of further liability by the other, persisted in throughout the time for performance, impeaches the promise made by him, and should so absolve the other from his bond under the contract as to excuse the performance of his undertaking as a condition precedent to his recovery in damage for the default of the other.

The question came up for decision in the leading case of *Cort vs. The Ambergate Railway Company*, 17 Q. B., 127. The case was an action for damages for the breach of a contract for the manufacture and supply of a quantity of railway chairs from time to time, to be paid for after delivery. After receiving and paying for a portion of the chairs contracted for, the defendants gave notice to the plaintiffs not to deliver any more, as they would have no use for them. No more were sent or required afterward, and there was no offer to send the remaining chairs, nor refusal to accept them. The declaration averred, as a breach of contract, that despite the readiness and willingness of the plaintiffs to perform their part, the defendants had wrongfully prevented and discharged them from supplying the residue. It was contended for defendants that the facts did not support the declaration; that to prevent must be by an obstruction by physical force, and that, inasmuch as these facts did not exist, the contract had continued in force; so that it was necessary for the plaintiffs, in order to maintain an action upon the contract, to prove performance of their part under it by manufacture and tender of the chairs. The question before the court was, whether the bare renunciation constituted such a breach as to discharge the contract. If it did, the plaintiffs could maintain an averment of readiness and willingness to perform without proving tender of the goods; if it did not, they were still

bound to perform their part of the contract before they could have a right of action for breach by the other party. The court held that the declaration was supported by the facts. Lord Campbell, C. J., stated the broad ground of the decision to be: "When there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser, having accepted and paid for, a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them."

This decision is conclusive upon the facts of the case; but, in respect to the time of renunciation, the facts were that the period for performance had arrived, and, in respect to the time of bringing the action, the time for performance had expired; and, therefore, the default of the defendants was complete. Lord Campbell, after commenting upon the cases of *Phillpotts vs. Evans*, 5 M. & W., 475, and *Ripley vs. McClure*, 4 Ex. 345, brings this case within, what he conceived to be, the ruling in the latter, on the ground that there was a *continuing refusal*. Therefore, the decision is limited in authority to an action brought after the time for performance has arrived for a renunciation when the performance was due.

III. The third form of renunciation, before the time for the performance, presents an entirely different case

from the second. The time for the promised performance has not yet arrived; the promisor is not bound to do anything until a future day, and so can not be put in default for non-performance by any demand made by the other party. Such being his position, the question arises, whether any mere expression of intention as to what his conduct shall be, when the time for performance does arrive, can be in violation of any right of the other party, and do him such present injury as to entitle him to an immediate action for redress. It is in answer to this question that the divergence of opinion and difference in laws, upon the effect of a renunciation of a contract, make their appearance; and for the investigation of this subject it may be divided into

(1.) The reasoning upon which the doctrine of an anticipatory breach by renunciation is founded, and the effect of its application.

(2.) The prerequisite conditions, necessary to its operation.

(3.) The extent to which it has been adopted.

(1.) Preliminary to the first question, it may be remarked that, if it be conceded, that when an obligor declares an intention in advance of the time set for performance, to violate his contract, an injury has been done the other party, that, not only, bestows upon him negative rights, but entitles him to immediate positive relief, the proper method is by an action on the contract. Chief Baron Kelly, in the Court of Exchequer, in the case of *Frost vs. Knight*, was unable to convince himself of the logical consistency of the theory, that the contractual relation was violated by a mere expression of intention before performance was due, and so denied that redress should be attempted by an action *ex contractu*. Nevertheless, feeling that even a bare renunciation may be a cause of

injury, demanding some kind of remedy, he proposed a special action in tort, for the recovery of any damage suffered, as a logical solution of the dilemma. But Cockburn, C. J., in the Exchequer Chamber, in the same case, expressed himself surprised at the proposition of such an incongruous mode of relief, and answered that even it would be tantamount to an action *ex contractu*, inasmuch as the damages would have to be assessed upon the same basis as for a breach of the contract. Therefore, he preferred to ground the remedy upon the contract itself.

Admitting, then, that the remedy, if there should be one before the time for performance has arrived, should be upon the contract, on what reasoning can it be vindicated? Plainly it can not be upon the ground that there has been a violation of the formal agreement, contained in the contract. In form, the promisor agreed to perform his obligation at a future time, and, until that time arrives, and he neglects or refuses to do the thing promised, it is not possible that he can have committed any breach of his verbal promise. Any previous declaration of an intention not to perform the contract when the time does arrive, is merely the expression of a state of mind in regard to future conduct, that is not included in or prohibited by, the formal terms of the contract. Another change of mind may occur before the time for performance arrives; the promisor, who had once renounced his obligation under the contract, may then be ready and willing to discharge the obligation by complete performance, and, in so doing, will have met to the full the only duty imposed upon him by the verbal form of his undertaking. Therefore, it becomes necessary to go one step further in order to substantiate the doctrine of a present violation by an anticipatory renunciation, and demon-

strate that the spirit, if not the letter, of the agreement is thereby impeached. This is the principle behind which, as a stronghold, its defenders wage battle for the doctrine that mere renunciation of a contract, anticipatory to the stipulated time of performance, is as truly a breach of the promise made in the contract as is non-performance when the appointed day for carrying out the promise has arrived.

The law has been somewhat vacillating upon this question, and for the authorities by which it is settled and the reasons advanced against them, we will now refer to some cases.

On several occasions, prior to the adjudication of *Hochester vs. De la Tour*, the leading case upon this subject, the question was considered indirectly, and opinions were expressed, of which it can certainly be said that they are no authority for, if they are not in direct variance with, the principle laid down in that case. *Phillpotts vs. Evans*, 5 M. & W., 475, decided in 1839, was an action in assumpsit for not accepting a quantity of wheat. During the time the wheat was in transit, the defendant gave notice that he would not receive it, if it were delivered. When the wheat arrived, it was tendered and defendant again refused to receive it. The question was whether the damages should be assessed at the difference between the contract price and the price when the wheat was to be delivered or on the day when the first renunciation was made. It was held that the proper time to estimate them was when the defendant ought to have received the goods, and the words of Baron Parke, in delivering his opinion, are unmistakably indicative that he believed the rule of the common law to be different from that laid down in *Hochester vs. De la Tour*: "If it could have been established that the plaintiffs, after the notice

given to them, could have maintained the action without waiting for the time when the wheat was to be delivered, then the proper measure of damages would be according to the price at the time of notice. But I think that no action would then have lain for the breach of the contract, but the plaintiffs were bound to wait until the time arrived for the delivery of the wheat to see whether the defendant would then receive it. The defendant might then have chosen to take it, and would have been guilty of no breach of the contract; for all that he stipulates for, is, that he will be ready and willing to receive the goods and pay for them, at the time when, by the contract, he ought to do so. His contract was not broken by his previous declarations that he would not accept them; it was a mere nullity and it was perfectly in his power to accept them nevertheless, and vice versa the plaintiffs *could not sue him before*. The same rule was adopted in *Stortup vs. Cortazzi*, 2 C. M. & R., 165. The notice amounts to nothing until the time when the buyer ought to receive the goods, unless the seller acts on it in the meantime and rescinds the contract." In *Ripley vs. McClure*, 4 Ex., 345, there was also a renunciation before the goods contracted for had arrived, and, although the case was decided upon the ground of a continuing refusal down to the time of their arrival, Baron Parke took occasion to again express his opinion as to the then state of the law upon the effect to be given to the anticipatory refusal. He re-affirmed the opinion given in *Phillpotts vs. Evans*, supra, and said: It was contended for the defendant, that, to constitute a breach of the contract, a refusal *at any time* was insufficient; that it must be a refusal after the arrival of the cargo, and that the supposed refusal in July, which was long before the contract to buy became abso-

lute, was no breach and nothing more than an expression of an intention to break the contract, not final and capable of being retracted. And we think that if the jury had been told that a refusal *before the arrival of the cargo was a breach, that would have been incorrect.*" These expressions by Baron Parke as to his view of what the common law rule was are of no uncertain tone. They are couched in most unambiguous terms and only admit of the one interpretation, that for an anticipatory renunciation the other party "could not sue" before the time for performance. Giving them the weight due to such high authority, this would seem to be the conceded law at that time, so much so that its overthrow can be deemed nothing short of revolutionary.

Such was the legal frame of mind when the leading case, *Hochester vs. De la Tour*, 2 E. & B., 678, came up for decision. The declaration was on an agreement by defendant to employ the plaintiff as a courier, made April 12, and to take effect June 1st. The breach assigned was that before the day for commencement of the employment, the defendant wrongfully refused to perform the agreement and discharged the plaintiff from performing it. The facts were that on May 11th the defendant wrote to the plaintiff that he had changed his mind and declined his services. The action was commenced by plaintiff on May 22d, and it was held that under the circumstances he was entitled to recover.

Lord Campbell, C. J., in rendering the decision, enunciates a broad principle as underlying the contractual obligation which, up to that time, had never been directly applied in any adjudicated case, and, as we have seen, had been specifically denied in some: "When there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the



contract, and they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and a woman engaged to marry are affianced to one another during the period between the time of the engagement and celebration of the marriage. In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other, and it seems to be a breach of an implied contract if either of them renounce the engagement. The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately or to wait until the time when the act was to be done, still holding it as prospectively binding for the exercise of this option."

In support of this conclusion Lord Campbell cites a number of cases upon breach of contract by impossibility, created by the conduct of one of the parties. He interprets these cases to have decided that when there is a contract, performance of which is due at a stipulated time in the future, if one party by his conduct renders it impossible in advance for him to perform his part when it becomes due, the other party may have an action for damages before the time for performance has arrived. Then, by analogy, he argues that the same rule should obtain where one party wrongfully renounces an obligation to perform a contract on a future day, as in the case under consideration. But the rule which he deduces from the cases cited and upon which he founds his arguments by analogy, does not seem to be supported by the facts of those cases. This has been pretty conclusively

shown by Kelly, C. B., in *Frost vs. Knight*, L. R. 5 Exch., 322, and by Wells, J., in *Daniels vs. Newton*, 114 Mass., 530. They are all distinguishable either on the ground that the performance was not for a future day but upon demand, or else it did not appear that the action was brought before performance was due. For example, *Short vs. Stone*, 8 Q. B., 358, was a contract to marry within a reasonable time after request, and not at a given future day, and in *Planchè vs. Colburn*, 8 Bing., 14, where the contract was to write a treatise for a serial publication, and defendant made performance on his part impossible by abandoning the publication, the plaintiff would have been entitled to compensation upon completion of his work. So, in *Elderton vs. Emmons*, 4 C. B., 479, the contract was for employment for a year, and the action was for a wrongful dismissal before the end of the year. Therefore, it seems that the cases cited are authority for a no more extension rule than that, when the plaintiff would be entitled to require performance upon demand, or upon some act which the conduct of defendant has dispensed with, then an action will lie at once if one party puts it out of his power to perform his part. Moreover, Lord Campbell, in his attempt at distinguishing Baron Parke's statements of the law in *Phillpotts vs. Evans*, 5 M. & W., 475, and in *Ripley vs. McClure*, 4 Ex., 345, did not succeed in establishing satisfactorily that they were not in direct opposition to the doctrine which he was then expounding. He was more logical when he accepted the responsibility of creating a new rule of law, and admitted that if Baron Parke meant, what his words seemed to import, his exposition of the law could not be followed. It may safely be said, therefore, that this decision was a departure from the interpretation of the common law previous to that time, and it remained for

future decisions to extend or restrict the application of the principle laid down, by a liberal or strict interpretation in applying it to the facts of other cases.

The broad statement of the doctrine laid down by Lord Campbell, did not meet with ready and unquestioned acquiescence. When the occasion arose for its application in a case in the Court of Exchequer, the validity of the reasoning upon which it was founded and the support of the precedents cited as authority for it, were questioned and an attempt was made to so distinguish the contract in question from that in *Hochester vs. De la Tour* as to escape the application of the doctrine and so limit its extension. The case was that of *Frost vs. Knight*, L. R. 5 Exch., 322. The action was for a breach of promise of marriage. The promise proved was that the defendant would marry the plaintiff when and as soon as the father of the defendant should die. While the father was yet living, the defendant refused ever to marry the plaintiff, and without awaiting the occurrence of the event upon which the promise was to be fulfilled, the plaintiff immediately brought an action to recover damages for breach of the contract. In the Court of Exchequer, Kelly, C. B., distinguished the case of a contract of marriage from a commercial contract, where expenses had been incurred before the date from which the performance of the duties was to commence, and, on that ground, he refused to bring the case under the ruling in *Hochester vs. De la Tour* and arrested the judgment given for plaintiff at Assizes. This was evidently a labored attempt at distinguishing an undistinguishable case in order to evade the application of a rule of law, which the Chief Baron would have been ready to reverse had he been sitting in a court of last resort.

In the Exchequer Chamber, L. R., 7 Exch., 111, where the case was brought on a writ of error, the judgment of the Court of Exchequer was reversed in an exhaustive opinion by Cockburn, C. J. He placed his decision upon such broad and comprehensive grounds as to include every possible kind of contract, and so rendered it thereafter impossible to create any exceptions to the rule by distinctions as to the nature of the contract, such as was attempted by Chief Baron Kelly. In his decision, he said: "It is true, as is pointed out by the Lord Chief Baron, in his judgment in this case, that there can be no actual breach of a contract by reason of non-performance so long as the time for performance has not yet arrived. But, on the other hand, there is—and the decision in *Hochester vs. De la Tour* proceeds on that assumption—a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. The promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance arrives. In the meantime he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficiency may be essential to his interests. It is quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it, the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the promisor and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes verbally involved in the action as one of the consequences of the repudiation of the contract, and the eventual non-performance, may, therefore, by anticipation, be treated as a

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## CONTENTS.

|                                                          | Page. |
|----------------------------------------------------------|-------|
| I. Pennsylvania Jurisprudence, . . . . .                 | 786   |
| HIS HONOR, JUDGE SIMONTON.                               |       |
| II. The Work of the Bar Association, . . . . .           | 812   |
| PROF. J. NEWTON FIERO.                                   |       |
| III. Legal Education and Admission to the Bar, . . . . . | 830   |
| PROF. GEORGE WHARTON PEPPER.                             |       |
| IV. The Local Bar Association, . . . . .                 | 856   |
| ALEX. SIMPSON, JR., ESQ.                                 |       |
| V. Notes, . . . . .                                      | 868   |
| VI. The Quiz,                                            |       |
| Consider the Pennsylvania Statute of June 25, 1895, Pro- |       |
| hibiting the Public Employment of Aliens, . . . . .      | 874   |
| REGINALD HEBER INNES.                                    |       |

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The Pennsylvania Bar Association

AT ITS

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## *Pennsylvania Jurisprudence.*

*Charles H.*  
*By His Honor, Judge Simonton.*

It is said by Blackstone, (1 Comm., 108,) to be a principle of the common law, "That if an uninhabited country be discovered and planted by English subjects, all the English laws, then in being, which are the birthright of every subject, are immediately there in force," but he hastens to add, "This must be understood with many and very great restrictions. Such colonies carry with them only so much of the English law as is applicable to their own situation and the condition of the infant colony."

When the charter was granted to William Penn in 1682 and the first colonists came over to the Province of Pennsylvania, the two systems of jurisprudence, known respectively as law and equity, were firmly established in England in full operation side by side, administered by different tribunals, with different judges, and by the use of different forms. The principles declared and applied were not only different but often antagonistic; and the final issue of a cause might depend entirely on the circumstance that it was litigated in one of these tribunals and not in the other. So that, as was said by Lord St. Leonards: "On one side of Westminster Hall a man shall recover an estate without argument on account of the clearness of his title, and on the other side of the Hall his adversary shall, with equal facility, recover back the estate." If the theory on the subject stated by Blackstone had been realized in practice, these separate

and antagonistic systems would have been brought with them by the first settlers. But they did not permit it to be applied even in its modified form. When they abandoned their native land and established themselves in the new colony, they deliberately left behind them many of the institutions and customs of the mother country. In the "laws agreed upon in England," May 5, 1682, before they set sail, it was provided: "That in all courts all persons of all persuasions may freely appear in their own way and according to their own manner and there personally plead their own case themselves, or if unable, by their friends. \* \*

\* \* That all pleadings, processes and records in court shall be short and in English, and in an ordinary and plain character, that they may be understood and justice speedily administered." And in 1683, to avoid "long and tedious conveyances and the many contentions which may arise about the variety of estates" a form of deed shorter than those now in common use was prescribed by an Act of Assembly. These are typical instances, of which many others could be cited, showing the attitude of the first settlers towards the complicated systems and forms which they left behind in England. I have not the time to give others here; but those who are curious on the subject of the early administration of the law, and the nature of the original forces which moulded the jurisprudence of Pennsylvania, will be well repaid for the time spent in reading a most interesting paper, read before the Historical Society of Pennsylvania, March 4, 1881, by Lawrence Lewis, Jr., entitled: "The Constitution, Jurisprudence and Practice of the Courts of Pennsylvania in the Seventeenth Century," published in the Pennsylvania Magazine of History and Biography, Vol. 5, p. 141.

From this paper and the sources to which it refers, as well as from statements made by the judges of the Supreme Court in the earlier reports, we find that prior to the middle of the eighteenth century there were few lawyers in the Province. The judges of the Supreme Court were not often lawyers, and it is true, as stated in an address delivered in 1826 by William Rawle, Sr., in Philadelphia, that "before the Revolution the Bench was rarely graced by professional characters." The result was that these judges, not learned in the law, administered justice and equity, as understood by them, without being influenced, to any great extent, by technicalities or forms of procedure. The courts, not excepting the Courts of Quarter Sessions, were declared in many Acts of Assembly to be courts of equity as well as courts of law; but at the same time there was manifested a great aversion to a separate court of chancery and to the use of chancery forms. A court of chancery did, indeed, exist for a time, but it never gained a foothold as a permanent institution. Practically, all that is known with respect to this court may be found in the very valuable lecture on "Equity in Pennsylvania," delivered in 1868, in Philadelphia, by William Henry Rawle. Mr. Rawle states (p. 22) that the familiarity with the principles of equity shown in the earlier cases satisfied him that there must have been a time when those principles were administered in more or less conformity with the course of practice in chancery; and that this led to a search, which resulted in the discovery of the "Register's Book of Keith's Court of Chancery," which is printed as an appendix to his address.

It may well be doubted whether the existence of such a court from 1720 to 1736, with the comparatively small amount of business done in it, and with a chancellor not

learned in the law, would account for the remarkable acquaintance with equitable principles possessed by the judges of the Supreme Court more than half a century later. We should rather be inclined to believe that this was obtained by a study of the cases decided in the chancery courts of England. At all events, Keith's Court was short lived, and for a century thereafter equitable principles were applied and administered in Pennsylvania without the use of chancery forms.

We find in the earliest reported cases that equity is declared to be a part of the law, while the only courts in existence were in form courts of common law. Thus, in *Swift vs. Hawkins*, decided in 1768. 1 Dall., 17, where under the plea of payment, it was objected that want of consideration could not be given in evidence, Chief Justice Allen said: "There being no court of chancery in this province, there is a necessity, in order to prevent a failure of justice, to let the defendants in under the plea of payment, to prove mistake or want of consideration;" and this, he said, had been the constant practice for thirty-nine years past—which would go back to 1730.

In *Mackey vs. Brownfield*, 13 S. & R., 240, Judge Duncan says the above case is "the Magna Charta of this branch of equity, and has been, ever since, followed, and rules of court universally established, requiring notice of the special matter, fraud or failure of consideration, intended to be given in evidence, in avoidance of the bond; this notice answering to a bill in equity for relief, on the ground of fraud, accident, or mistake; and our common law courts by the instrumentality of a jury, grant relief, just as the chancellor does—according to the dictates of his conscience, governed by equitable rules."

In other words, equity principles had survived during the more than one hundred years since the settlement of

the colony; while chancery forms, by means of which these principles were, during that time, and have since, until recently, continued to be administered and applied in England, had disappeared. The problem which confronted the courts, as they understood it, was, therefore, how to apply and administer these principles under and by use of the common law forms. That they were greatly embarrassed in working out this problem is manifest. Complaints and regrets of the want of chancery forms are numerous in the opinions of the judges of the Supreme Court through the first half of this century. At the same time, however, they were, in the main, steadfast and resolute in their determination to accomplish the result; and if they sometimes felt themselves hampered or limited for the want of the more flexible forms used in chancery, they would act in the spirit expressed on one occasion by Chief Justice Gibson, when he said: "That we cannot do everything is no reason for not doing anything."

Curiously enough, the best account of the gradual rise and development of the system by means of which this end was accomplished, as well as the ablest defense of the system itself, is to be found in an essay entitled "Equity in Pennsylvania," prepared as an academical exercise for the Law Academy of the University of Pennsylvania, in 1826, by Anthony Laussatt, Jr., of which Mr. Rawle in the address above referred to, justly speaks in terms of high commendation, saying that "it now forms part of our legal literature, its merits have been recognize on both sides of the Atlantic, and no one who desires to understand the development of our peculiar jurisprudence can afford to ignore it." And Chancellor Kent, 4th Com. 164, note, referring to the administration of equity in the common law courts of Pennsylvania, says:

"These principles of equity have been digested from the acts of the Legislature, and the decisions of the Supreme Court, with diligence, ability and judgment, in a clear and neat little code of equity law, under the unpretending title of "An Essay on Equity in Pennsylvania, by Anthony Laussatt, Jr., Student at Law, 1826."

In view of the ability and thoroughness with which the development and peculiar nature of Pennsylvania jurisprudence have been discussed and unfolded in the three essays above referred to, it would be presumptuous for me in this brief paper to attempt to do more than to add a few illustrations ; and my main purpose will be accomplished if by calling the attention of the members of the Association to this subject and to these papers, and the sources referred to in them, as well as to the many most able and instructive opinions by judges of the Supreme Court contained in the earlier reports, they may be led to a closer study of the nature and genius of our Pennsylvania jurisprudence, the crowning glory of which, in my opinion, is that the efforts of other common law jurisdictions to abolish the artificial distinction between law and equity which needlessly arose in England and so became part of the legal inheritance of her colonies, were anticipated by nearly a whole century in Pennsylvania. Judge Dillon, in 1894, speaking of the jurisprudence of this country in general, and of the momentous consequences which have flowed from the separation of the two jurisdictions of law and equity and the creation of equitable rights and estates distinct from legal, could only say: "These two streams have so long flowed in distinct channels, that, although we regret the injurious consequences of the unnecessary separation, yet with the habitual caution of our profession, we hesitate to unite them, because we cannot clearly foresee all



the results. The tendency to their union is, however, marked and strong. The law stream is ever increasing in volume and momentum, and is, though unperceived, inexorably eating away the narrow banks which divide it from the equitable. Nothing that lies in the future seems to be more certain to occur than at no very distant period they are destined to join each other and to form a grand lordly stream which, after the first disturbance is over, Denham's lines will fitly describe:

"Though deep, yet clear, though gentle, yet not dull,  
Strong without rage, without o'erflowing, full."

But in 1854, our Judge Black, after saying "there never was any natural reason for separating justice from law, or law from justice; and it was emphatically right to break down the artificial wall of partition which certain professional interests had built up between them in the mother country. Some of the States of this Union, after a full trial of chancery, have imitated our example; others are rapidly preparing to do so, and even English reform has gone far in the same direction," could truthfully add, anticipating Judge Dillon in using the figure of a stream, "equity and law, though flowing originally from different sources, run here in a stream completely intermingled, the whole of which is properly called law, and common law as contradistinguished from statute law," *Finley vs. Aiken*, 1 Grant, 98.

If any person who understands the nature and development in this direction of Pennsylvania jurisprudence, wishes to see how it has anticipated and exceeded the advance of other States, let him read sections 84 to 88 of Pomeroy's Equity Jurisprudence, stating what has been accomplished by the so-called reform procedure. The conclusion which he will then be prepared to draw, I think, will be that it would be an anachronism for us

now to follow them in adopting methods by which they hope to reach an end which we have long since reached in our own and better way.

This peculiarity of our jurisprudence has not always been understood or looked upon with favor by jurists outside of the State. Thus, Judge Story, in 1836, 1 Eq. Jur., 50, referring to the mode in which equity was administered in Pennsylvania, said: "In Pennsylvania it was formerly administered by means of the remedies and proceedings of the common law. It was thus mixed up with legal rights and titles in a manner not easily comprehended elsewhere. This anomaly has been in a considerable degree removed by some recent legislative enactments." And Professor Pomeroy, in the work quoted above p. 317, note, says on the same subject: "Prior to the legislation hereinafter mentioned the courts of Pennsylvania possessed no equity jurisdiction whatever. To prevent the absolute failure of justice which would otherwise have followed, they had invented a curious system by means of which some equitable principles and rules were enforced, and some equitable reliefs were given through the ordinary common law forms of action. For example, in the action of ejectment an equitable right or title was permitted to be set up by the defendant, and then after the verdict of the jury the equities of the party were worked out by an alternative or conditional judgment. This whole system was, of course, cumbrous, and could only be applied within a narrow limit." It is, perhaps, not surprising that one who had devoted so much study to chancery forms and procedure, as had Judge Story, should not on a cursory examination have comprehended or approved the Pennsylvania mode of administering equity principles. But it might, we think, have been expected that Professor Pomeroy, who was such an

ardent admirer of the so-called reformed procedure, the fundamental principle of which he recognizes to be the union of law and equity principles, would have better comprehended the extent to which this had been accomplished in Pennsylvania.

It was the opinion of Blackstone that the separation of the jurisprudence of England into law and equity might readily have been avoided. In Book 3 of the Commentaries, p. 48, after saying that "the distinction between law and equity as administered in different courts is not at present known, nor seems to have ever been known, in any other country, at any time," and that, in his opinion, "in early times the chief judicial employment of the chancellor must have been in devising new writs directed to the courts of common law, to give remedy in cases where none was before administered;" he refers to the Statute of Westmin. 2, which enacted that "whensoever from thenceforth, in one case a writ shall be found in chancery, and in a like case falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in chancery shall agree in forming a new one, and, if they cannot agree, it shall be adjourned to the next Parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future that the court of our lord, the King, be deficient in doing justice to the suitors." And of this statute he says: "Which provision, with a little accuracy in the clerks of the chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ, might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery by the oath of the defendant;" which last purpose has now been effectually accomplished by legislative enactments making parties competent witnesses.

Judge Rodgers, in *Martzell vs. Stauffer*, 3 P. & W., 398, after citing the above from Blackstone, says: "As we have no clerk in chancery, it is the duty of the courts themselves so to fashion our remedies as to administer relief to suitors, according to the exigency of their business and adapted as near as may be, without violence to the forms of action, to the specialty, reason and equity of his very case. And, unless some liberality is shown by the courts in this respect, we must give up the boast of the common law that there is no wrong without a remedy."

As is said by the Revisers, 2 Park & John., 815, this Statute of Westm. 2 was declared by the Judges to be in force in Pennsylvania, Robert's Digest, p. 158, and it does not seem entirely easy to understand why the Supreme Court instead of complaining of the want of power and being in fear of "doing violence to the forms of action" did not act upon Blackstone's opinion by devising new forms or adopting those already in use in chancery under the power conferred on them by this statute. Moreover, it does not seem possible that a court could be powerless to apply and enforce principles which it recognized to be the law of the land. This view evidently occurred to Judge Gibson, for in *Loan Co. vs. Elliott*, 15 Pa., 224, he said "when this court first declared equity to be part of the law of Pennsylvania, it had one of two things to do in order to carry its declaration out—either to assume the powers of a court of chancery, or to strain relief through common law forms, disregarding technical congruity when found to stand in the way of justice. Unfortunately, it attempted a middle course. \* \* \*

A plaintiff has been allowed to declare on a lost bond without a profert; a defendant has been allowed to plead matter of equitabe defense specially, and many other de-

partures from common law rules have been sanctioned. We have not yet gone so far as to disregard the form of the writ, count or judgment; but why should we not do so when justice cries out for it, and there is no other way to appease her clamor? or why should we choose to give relief in handcuffs? From the moment the court departed in the least from technical form, there could be no stopping place short of perfect and entire justice." And, speaking of the case before him, he adds: "The action is essentially a bill in equity, and the fashion of its drapery is surely not a matter of the first importance. If it were so, no common law action could be substituted for a bill in any case; and to sustain it in this instance, though irregular even as an action, requires the court to go only a step further than it has already gone." Whereupon the court took the necessary step to sustain an action against a surviving promisor and the executors of a deceased co-promisor.

If the court had uniformly acted on this principle, and especially if it had exercised the powers conferred upon it by the Statute of Westm. 2, it could have not only adopted entire equity principles, but could have devised and adopted forms, and administered all equitable relief required; and there would have been no necessity for the frequent complaints made by the judges that, while they recognized and applied equity principles, they did not possess chancery powers. That they did not cast off entirely the shackles of form imposed by common law procedure, shows only the force of education and custom; that they did so to such a great degree speaks well for their sense of right, and shows the grasp they had obtained upon the fundamental principles of equity. How much they were influenced by these is seen in the declaration of Judge Gibson in *Torr's Estate*, 2 R., 252, de-

cided in 1830, that "equity is a part of our law, and I would just as willingly disturb the foundations of the common law, laid in the time of Lord Coke, as shake a principle of equity settled by Lord Talbot, Hardwicke or Northington. We ought to disclaim everything like a discretion to adopt or reject, according to our notions of expediency; nor, if we had the power, is there one of those principles which I would desire to reject."

One of the beneficial effects of the want of a court of chancery on the administration of justice in Pennsylvania, was that in many cases it was much simplified. Some illustrations of this may be given. Thus, in 1817 in New York, *King vs. Baliken*, 3 John Ch. Ca., 599, Chancellor Kent decided that a surety was not discharged from liability by calling upon the creditor to bring suit against the principal debtor and the refusal of the creditor so to do; founding his opinion mainly on the fact that the surety could go into a court of chancery and obtain a decree compelling the creditor to sue. But when this question arose in Pennsylvania in 1822, *Cope vs. Smith*, 8 S. & R., 110, our court had no difficulty in holding that where such a request and refusal were clearly proved, the surety was discharged; the controlling reason for this conclusion being that as the court was bound to administer equity and had no chancery forms through which this could be done, a request to bring suit which, in equity, ought to be acted upon by the creditor, should be held equivalent to a decree of a court of chancery ordering him so to do; and his refusal equivalent to disobedience to such decree. Thus, equity as understood both by Chancellor Kent and Chief Justice Tilghman entitled the surety under the facts stated to be discharged; but having the formal means of working out this equity, Chancellor Kent decided that he must first prove the facts

in the court of chancery and get its decree ordering the creditor to proceed, and if he refused and brought an action in a court of law upon the obligation, the surety could set up the decree in chancery, and the failure of the creditor to obey, as a defense. Chief Justice Tilghman disposed of the matter in a much simpler way, by declaring that the surety might prove his whole case in the action against him for the debt.

The one condition imposed by Judge Tilghman was that the demand on the creditor to bring an action against the principal debtor must be positive, and be proved clearly and beyond all doubt, and be accompanied by a declaration that unless it be complied with the surety will consider himself discharged. Compliance with these conditions obviated entirely the principal objection made by Chancellor Kent, who saw the danger of relying upon the proof of a request having been made, and of its precise terms. Acting in the spirit of the conditions imposed by Judge Tilghman, the Legislature, in 1874, enacted that the notice must be in writing, thus effectually disposing of the difficulty of proof.

Another illustration is furnished where two were bound jointly in a bond. In such a case one could not show in a jurisdiction where there was a court of chancery, in an action against him on the bond, that he was merely a surety and claim to be discharged for laches of the creditor. To obtain equity as against his creditor he was obliged to go into a court of chancery for a decree declaring him to be a surety and requiring the creditor to proceed against the principal debtor. But in Pennsylvania, in an action against him, he can show the real relation existing between himself and the principal debtor and obtain all the relief in the action which could be had in a court of chancery.

Still another illustration is to be found in the case of *Jamison vs. Brady*, 6 S. & R., 466, where the facts being such that in a jurisdiction having a court of chancery, a decree would have been made requiring the husband to make a conveyance to a trustee for his wife, the court said: "In this State, where there is no court of chancery, no decree can be made for the husband to convey to a trustee. Nevertheless, it is his duty to do so; and if he does not the courts of law will consider him a trustee and the wife will have all the beneficial effects flowing from that consideration."

So it was early in *Auwerter vs. Mathiot*, 9 S. & R., 402, that "by the law of Pennsylvania all the real estate of the debtor, whether legal or equitable, is bound by a judgment against him, and may be taken in execution and sold for the satisfaction of the debt. At common law, an equitable estate is not bound by a judgment or subject to an execution; but the creditor may have relief in chancery. We have no court of chancery, and have, therefore, from necessity, established it as a principle, that both judgments and execution have an immediate operation on equitable estates."

The case of *Biddle vs. Moore*, Pa., 175, furnishes a good example of the manner in which equitable relief is granted by means of a conditional verdict; and, also, illustrates the fact that the grant of chancery powers in the Act of 1836 did not oust the jurisdiction of the courts to grant equitable relief under common law forms. In this case, a verdict was rendered in favor of the plaintiff to be released on the payment of a certain amount to him, and also two other different amounts, one to each of two other persons, the court saying: "The verdict is in substance a decree in chancery with all the certainty which is required. The money belonging to the plaintiff



is ordered to be paid to him; the debts to the respective creditors; so that the defendant is at no loss to ascertain to whom the money, in discharge of the liens on the land, is to be paid." And while it was recognized as a departure from common law forms to render such a verdict, it was considered analogous to what would be done in a chancery proceeding.

That the courts did not always apply equitable principles ought not to surprise us; rather may we be surprised that they so seldom failed. One instance in which we think they did fail was in determining the right of the husband to the proceeds of the sale of the wife's separate real estate. Thus, in *Yohe vs. Barnet*, 1 Binn., 365, regretting that it had not the power, as had a court of chancery in England, to insist on the husband making some suitable provision for his wife when he came into court to get possession of her personal property, the court permitted the proceeds of the sale of the wife's separate real estate in proceeding to make partition, to be applied to the payment of her husband's debts, being of the opinion, as stated by Judge Gibson in a later case, (1 P. & W., 373,) that to "treat it as land, or follow it into land purchased with it, for the purpose of establishing a resulting trust in favor of the wife, would introduce an equity hitherto unknown to the English or to the American courts." But, as was said by Judge Lewis, in 1843, 5 W. & S., 502, "this decision was never satisfactory to the profession." And he shows that, on principle, the fund ought to be held to continue to be real estate and the separate property of the wife. This view, however, does not seem to have been suggested until after it had come to be considered a settled rule of property that the wife's real estate became personal by the sale. This result was afterwards much regretted, as appears from several

cases, in one of which Judge Gibson says: "Had it been foreseen that a contrary result would be produced by turning a wife's land into money, it would doubtless have been prevented. For myself I shall never consent to give effect to a claim of the husband, or those in his stead, to what was at any time the wife's real estate, if it is possible to defeat it by any construction however forced," which emphatic declaration shows that the judicial mind, imbued with the principles of equity, was already revolting against the legal principle of the identity in person of husband and wife. The whole difficulty might readily have been prevented by the adoption of the principle that the wife's estate after the sale in proceedings in partition remained real estate. As it was, the remedy had to be applied by the Act drawn by the Revisers and passed March 29, 1832, which is a good illustration of the way in which the Legislature could and did aid in blending law and equity into one system.

The application of equitable principles, and the administration of equitable remedies under common law forms with the concurrence of a jury, have led to the adoption of a rule as to the manner of submitting such cases, which is, so far as we are aware, peculiar to Pennsylvania, and in sharp contrast with the ordinary practice that where there is conflicting testimony, and room for contrary inferences from the facts when found, the case must be given to the jury who are to draw the inferences as well as to find the facts. The usual rule is thus stated in a recent case, *Holland vs. Kindregan*, 155 Pa., 160, "It does not follow that because the evidence on one side may be overwhelmingly in the opinion of the trial judge, that the case can be withdrawn from the jury. If there is a conflict of evidence it must go to the jury unless the evidence on one side amounts but to a scintilla."

On the other hand, in *Church vs. Ruland*, 64 Pa., 432, Judge Sharswood, speaking of the administration of equity with the concurrence of a jury, says: "Nor is such an administration of equity justly open to the reproaches cast upon it in the oral argument of this case. It is not the substitution of twelve unlearned chancellors for a lawyer prepared for his office by the lubrications of twenty years. The judge in reality is the chancellor with the assistance of a jury. It is not like other ordinary trials at law, where any evidence reasonably tending to prove a fact, must be submitted to be passed upon by that tribunal. The conscience of the judge as chancellor must be satisfied and what goes to the jury is to determine the credibility of the witnesses, and to weigh and decide upon the force and effect of conflicting testimony. What is this but the trial of a feigned issue out of chancery?" And in *Brawdy vs. Brawdy*, 7 Pa., 159, Chief Justice Gibson, speaking of an issue in chancery, says: "The case must be proved to the entire satisfaction not only of the jury, but the chancellor also; and have not our courts, in giving effect to principles of equity through the same medium, the same legitimate control over the results of the evidence? It would be fatal to a systematic administration of the relief claimed, if they had not. If the jurors were the uncontrolled arbiters of the facts, we should, indeed, have what is aptly called by Justice Grier, in *Haslet vs. Haslet*, 4 W., 464, a hybrid species of equity." The earlier cases, it is true, left more latitude to the jury, but gradually the rule was established as above stated.

There are also certain classes of cases in which equitable relief is granted under common law forms where the amount of proof required to sustain a common law verdict is insufficient. *Stine vs. Sherk*, 1 W. & S., 196, is an

instance of this kind, in which it was decided that, to set aside a solemn instrument between parties and convert it into an obligation of different purport, on the ground of fraud or mistake, the evidence must be of what occurred at the execution of the instrument, and should be "clear, precise and indutiable." And the same thing is said and the same rule applied in many other cases, in some of which it is said that the evidence should be "clear, explicit and unequivocal."

The fact that equity and law are in Pennsylvania interchangeable terms was not always kept in mind by the judges. Thus, in *Gilder vs. Merwin*, 6 Wh., 541, Judge Sergeant decided that under the Act of 1836, which authorizes the granting of injunctions to restrain "the commission or continuance of acts contrary to law," an injunction could not be granted to restrain the issuing of an execution on a judgment, because it cannot be seriously contended that the issuing of an execution on a judgment confessed in a court of law is an act contrary to law; forgetting that, as was said by Judge Lowrie, in *Stockdale vs. Ullery*, 37 Pa., 486, virtually overruling the former case, "equity is so much a part of our law that the word 'law' often means both law and equity or either."

*North Pennsylvania Coal Co., vs. Snowden*, 42 Pa., 488, illustrates the real nature of an equity case in Pennsylvania; and the only essential difference there is between an action at law and a suit in equity, namely, that the right of trial by jury must, as is provided by the Constitution, remain as heretofore. Hence, the Legislature cannot give jurisdiction in chancery against the will of the defendant in a case which was of right triable by jury when the first Constitution of the State was adopted.

Another case to the same effect is *Tillmes vs. Marsh*, 67 Pa., 511.

The difference between an equitable case and one at law has been still further lessened by the modifications made in the equity practice by the recent rules promulgated by the Supreme Court under the power given to them in the Act of June 16, 1836, drawn by the Revisers in analogy to and for the purpose of making more clear, the provisions of the Statute of Westm. 2 above quoted. Indeed, there is no practical, and hardly any formal difference between the trial of an equity case under these rules and the trial of an ordinary case in which a stipulation has been filed waiving a jury trial. The rules of evidence are the same; the testimony is heard by the court in both; the principles of law to be applied on a like state of facts are identical; and the only possible difference which remains is that in the equity case the form of the judgment may be more flexible and comprehensive than in the case at law. But it cannot be assumed that the judgment either in form or substance will be in any case more comprehensive than the justice of the case demands. I am, therefore, unable to see, since our jurisprudence has reached its present stage of development, why a defendant should be allowed to interpose an objection to the suit being brought against him in the equity form unless he can show that the nature of the case is such that he is entitled to a jury trial, or that it belongs to a class for which the Legislature has provided a special remedy. .

An instance in which the courts were unduly influenced by the traditional idea of a distinction between law and equity occurred with respect to the power of the court in which a judgment had been entered by confession, to open the judgment for cause shown, and the ef-

fect of a refusal so to do. It was held in 1867, *Wistar vs. McManes*, 54 Pa., 327, that after such refusal by the court in which the judgment was entered, defendant could maintain a bill in equity to have the judgment opened. Judge Strong decided the case entirely on the principles applied in England and New York where law and equity were administered by separate courts, and reached the conclusion that "Opening a judgment in a court of law is always *ex gratia*. Restraining a plaintiff from proceeding upon it, if the defendant has an equitable defense, and has not been guilty of laches by failing to set it up when he had an opportunity, is demandable of right."

The learned Judge overlooked for the time that there are not in Pennsylvania distinct courts of law and of equity in the sense implied in the passage just quoted, and his statement is open to the objection made by Chief Justice Tilghman to a reported saying of Chief Justice Yeakes 8 S. & R., 115, that "sitting as a court of law" he could not decide that a creditor under the facts before him had discharged a surety. Of this Judge Tilghman says: "No man knew better than Judge Yeates that he was sitting not only in a court of law, but of equity, and that by the established usage of our courts the defendants might protect themselves by an equitable defense;" and hence, he doubted the accuracy of the report which ascribed the saying above quoted to Judge Yeates.

Judge Strong's decision was followed in 1873, *Ashton's Appeal*, 73 Pa., 163; but in 1879, in a like case, 89 Pa., 528, it was ignored; and in 1882, *Frauenthal's Appeal*, 100 Pa., 295, it was virtually overruled, the court saying that in deciding it, "no notice appears to have been taken of the fact that in New York as well as in England separate courts of chancery then existed, and

the equity powers of the common law courts were confined to narrow limits." Thus, this departure from well-established principles was corrected. And by the concurrence of the Legislature, in the Acts of 1877 and 1891, giving appeals from the opening or refusing to open a judgment, the symmetry of our law is preserved. And as is said by Chief Justice Lowrie, *Stephens vs. Stephens*, 1 Phila., 108, speaking of cases where chancery enjoins proceedings at law on account of fraud, accident, mistake or other equitable reasons: "in these cases we grant relief much more simply and beautifully, on notice, by the 'court laying its hand on the action,' 9 W., 94, and preventing its execution if in equity the party is entitled to relief."

The practical result and crowning merit of our system is that on any given state of facts the conclusions of law are the same whether the court in which they are declared be in form a court of law or a court of equity. It was, therefore, felt to be an anomaly when a series of cases developed the rule that under the same state of facts the Statute of Limitations might be pleaded in bar of a claim against the estate of a decedent in an action at law, whereas it could not be successfully pleaded if the same claim were sought to be recovered before an auditor in the Orphans' Court, which is a court of equity. This anomaly was thus stated by Judge Agnew in a dissenting opinion in 1869, *McCandless' Estate*, 61 Pa., 9, where, speaking of the creditor, he said: "He may go into the Orphans' Court at any time and be allowed his claim *nolens volens*, even though he cannot recover at law." This rule, however, continued in force until 1885, *York's Appeal*, 110 Pa., 69, then the cases which established it were overruled and this excrescence on our jurisprudence was removed.

In his essay referred to in the beginning of this paper, Mr. William Henry Rawle shows inclination to apologize for the Pennsylvania system of administering equity and applying some equitable principles in the use of common law forms; and he quotes from the address of William Rawle, above referred to, who said, in 1826: "It is time to reduce the uncertain coruscations of Pennsylvania equity to the safe and steady light of chancery."

Laussatt, on the other hand, was of the opinion that nothing more was needed to complete our system than to persevere on the lines along which so much progress had already been made, when he wrote in the same year, 1826. Thus, he says, p. 120: "It would seem that there is no strong, existing reason for the erection of a court of chancery or even for the granting of its general power to the courts as now established." See further what is said by him on this and the succeeding page.

Chief Justice Sharswood was of the same opinion. In his *Lectures on the Study of the Law*, p. 198, speaking of the application of equitable principles through common law forms, he says: "An historical examination of the cases would show how accurately this system proceeded without legislative interposition until it arrived at a point which left little to be desired, and which, though it naturally prepared the way for the subsequent introduction of chancery forms and proceedings, may well induce the doubt whether the heterogeneous concurrence of the two systems has really been any improvement. By recurring to the principles of equity as rules of decision in the ordinary common law action—especially the all-pervading one that whatever a chancellor would decree to be done, a court of law in Pennsylvania will consider as actually done—by permitting equitable grounds of relief to be made the subject of a special de-



claration—by recognizing the same principles in pleas and defenses, especially regarding the plea of payment with leave to give special matter in evidence as in effect a bill by defendant for relief and a prayer for an injunction—and lastly, by so moulding the verdict and controlling the execution as to accomplish the ends of a decree, and especially by the employment for this purpose of conditional verdicts to enforce the specific execution of contracts, it is difficult to see what real valuable objects of separate chancery jurisdiction were not substantially attained. Yet this whole system grew up—stone by stone—by what Bentham would term ‘judge-made law’—though it was really nothing else but the natural and legitimate growth and expansion of principles early adopted by the people themselves and carried out by the courts as the rightful exploiters of this common law or general understanding. A few Acts of Assembly, conceived in the spirit of the same system to extend the powers of the courts in some cases in which the common law process was inefficient, would have completed a structure of which Pennsylvania might have been justly proud.”

I am inclined to this view. There is certainly nothing in the nature of justice, or of its administration, which makes its separation into law and equity either logical or necessary. No such separation exists in any other jurisprudence than that of England and the countries whose jurisprudence has been derived from it.

I believe that the jurisprudence of Pennsylvania made an immense gain by the refusal to adopt and establish courts of chancery side by side with courts of law. The consequence was that the principles of equity were introduced into the very warp and woof of the law, so that, no matter what may be the form or nature of the case

which he is considering, the Pennsylvania lawyer or judge, as a matter of course, takes account of the equities involved, and gives them controlling weight in determining the conclusion which he reaches.

We have excellent authority for saying that it is far otherwise in those jurisdictions where the attempt has been made to unite law and equity by statute, and by adopting one form of procedure for all cases. Professor Pomeroy, in the preface of his valuable treatise on Equity Jurisprudence, says: "Every careful observer must admit that in all the States which have adopted the reformed procedure there has been to a greater or less degree a weakening, decrease or disregard of equitable principles in the administration of justice. \* \* \* \* \* The tendency has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules, and the ignoring, forgetting or suppressing of equitable notions. The correctness of this conclusion cannot be questioned nor doubted; the consenting testimony of able lawyers who have practiced under both systems corroborates it, and no one can study the current series of State Reports without perceiving and acknowledging its truth. In short, the principles, doctrines and rules of equity are certainly disappearing from the municipal law of a large number of the States; and this deterioration will go on until it is checked either by legislative enactment or by a general revival of the study of equity throughout the ranks of the legal profession;" and he adds that this state of the law was one of the chief motives for preparing the work in question.

It would, therefore, seem to be a part of wisdom for us to continue the development of our jurisprudence along the lines which we have hitherto followed, without making any revolutionary changes either in its form or sub-

stance. The tendency is toward simplicity of form and against giving undue weight to mere technicalities. Let this tendency operate in the future as it has in the past through simple Acts of Assembly, lopping off excrescences and dropping what has become cumbrous or useless and through a judicious application by the courts of the principle of development which still exists in our law, and which was greatly stimulated, and has been much more active and potent because the principles of equity had to be cast into different forms. Two illustrations of this, by the way, are to be found in a late volume of reports, 165 Pa., in one of which, p. 62, after an interesting discussion by Judge Mitchell of the course of development of the law in this State, in the same direction, the court took a step in advance, and held that judgment could be taken by default against a corporation in the Quarter Sessions which failed to appear after being properly summoned; and in the other, p. 439, a set-off was allowed on the special equities of the case, although "no exact precedent has been found for the case on its facts." And many other illustrations of the kind could be given.

An adequate treatment of my subject would require an examination of the numerous cases to be found in our reports, which illustrate the manner in which equitable principles have been applied in the use of common law forms, moulded and modified as became necessary from time to time. And a separate paper would be required for a full exposition of the ingenious manner in which equitable principles have been applied on behalf of plaintiffs by conditional verdicts, and equitable relief afforded defendants under the plea of payment with leave to give special matter in evidence.

I must, therefore, content myself with referring those

who wish to pursue the subject further to Mr. Laussatt's essay, where they will find the earlier cases carefully analyzed, and the theory and practice of conditional verdicts and equitable defenses clearly explained. Most of these cases are leading cases, and will serve as guides to those of later date which refer to them.

A comprehensive statement of the subject would make it necessary also to refer to and illustrate the equity jurisprudence which is administered in our Orphans' Court, and the work of the Revisers, from 1832 to 1836, as set forth in their reports to the Legislature during those years, and embraced in the Acts drawn by them and passed by the Legislature, especially the Act conferring additional chancery jurisdiction upon the courts, as well as the effect of this Act upon the administration of equity through common law forms. But all this must be omitted, at least for the present. I trust enough has been said to call the attention of the members of the Association to this subject and to the importance of a study of the genius and spirit of our Pennsylvania Jurisprudence, in order that we may be prepared intelligently to labor for its improvement.

## ***The Work of the Bar Association.***

*By Prof. J. Newton Fiero.*

It is a time-honored introduction to the charge by the court to the grand jury, that "the oath which you have taken is a brief and beautiful epitome of your duties," and it is usual to add that it is unnecessary to enlarge upon the powers and responsibilities which are therein so clearly and succinctly stated. It is equally the custom of the judge thereupon to proceed to an elaborate explanation of the rights, privileges and functions of the grand inquest.

In the by-laws of the Pennsylvania State Bar Association, as in the constitutions of its sister associations, there is embodied a concise and distinct statement of the purposes of the organization. This declaration seems an adequate and complete presentation of the objects sought to be accomplished; but following the example of the court in like case, I shall somewhat amplify this provision and enlarge upon the practical work of associations of members of the Bar.

The formation of associations of this character is a recognition of the futility of individual effort and of the power and influence of organization; an admission that the lawyer, unaided by co-operation on the part of his brethren, can, except in rare cases, accomplish but little that is of value to the profession or the public, beyond the performance of his duties as counsel and advocate.

It is the outgrowth of, and possibly an improvement upon, the compact and influential organizations of law-

yers in the mother country, concentrated in and gathered about the Inns of Court, which have done so much toward preserving the standard of ability and integrity of the Bar of England; and its efficiency has been most thoroughly recognized by a recent movement among English barristers looking toward the formation of a like association.

#### The Purpose of Bar Associations.

The association of members of the Bar has a higher purpose, however, than is possible for any organization which, as in most cases, has for its sole object the protection of the interests of a trade, class, or profession, in that it cultivates a broader and more liberal spirit in its effort to improve the science of jurisprudence in the interest and for the benefit of the people of the state.

While the line of differentiation is not sharply drawn, yet the aims of such an association divide themselves into two classes: First, the oversight and care of the education of the prospective lawyer previous to his admission to practice, and the creation and maintenance of such a sentiment in the Bar as shall tend to uphold the honor and dignity of the legal profession; having as a subordinate and secondary aim, the cultivation of social intercourse among its members, and the perpetuation of the memory of those who have passed over to the majority. This may be termed the relation which the Association holds towards the profession. Second, the more important duty which lawyers, as members of the Association, owe to and undertake to perform toward the public, is, by way or revision and repeal of unwise, improvident and obsolete laws, through appropriate legislation; the prevention of ill-considered, hasty, careless and vicious legislation, so far as practicable under exist-

ing conditions, and the exercise of care and watchfulness over the administration of the law by duly constituted tribunals.

In the discharge of the obligations which lawyers owe to themselves, the first to be considered, and perhaps the more important, as influencing all the others and relating most intimately to the welfare and standing of the profession, and at the same time affecting the public interest, is admission to its membership. Questions relative to legal education and qualification have, during the past few years, received most careful consideration; and the standard of legal learning has thereby been, and is being, raised to and maintained at, a much higher point than was heretofore deemed practicable.

Scarcely less important is the preservation of the high standing of the members of the Bar, and the maintenance of the reputation for honor and integrity which is demanded from the profession, by means of discriminating, yet firm and uncompromising action in the discipline and exclusion of unworthy members.

Nor is the association of the members of the Bar for mutual improvement by closer acquaintance and the enjoyment of the social courtesies of life, to be passed lightly over, and as we recall how little is preserved of the life of an active lawyer, who has attained even a very high degree of prominence in his profession, we more fully appreciate the desirability and necessity of that branch of the work which is devoted to keeping green the memory of those who have passed away; thus rendering the department of legal biography one of the greatest interest and highest importance.

Thus far, as to the duties lawyers owe to, and undertake to discharge toward, each other by mutual association, embodying, however, very much due to the public as well

as to the profession. I, in no wise, underrate their importance, but the reference made to them must suffice at this time, since our object in this paper is to consider more particularly the work of the Association in its relation to the citizen and the state, and the manner in which that work can be most readily and effectually accomplished; and as to this branch of the subject only that portion can be touched upon relative to the general features of reform in the substantive law and methods for its administration.

#### A Plea Against Conservatism.

The lawyers of America are not to overlook the fact that we are nearing the close of the nineteenth century, with a strong predilection in many quarters for the adoption of twentieth-century methods of thought and action. It must be appreciated that rules of law and methods of procedure which were established at the period of the Norman Conquest, devised by the early Chancellors of England, and modified by the decisions of Eldon and Mansfield, are not now accepted without question or controversy. As affairs have been influenced by steam and electricity, so laws which were adapted to the time of William the Conqueror, served the purposes of a rude kind of justice in the days of Thomas a Becket, and were administered with many misgivings by the doubting chancellor and the great common law judge, will not be tolerated by the business public of to-day. The conservatism of the Bar must necessarily give way to the spirit of progress and we must adopt such rules of action and such methods of business are reasonably consonant with the disposition and responsive to the demands of the client. This boasted conservatism is not only beyond criticism, but deserves all praise, in so far as it



does not stand for opposition to modern thought and action; but when that conservatism is arrayed against the spirit of the time, it requires no prophet to foretell the result, and it is the part of wisdom for the profession, acting through association of its members, to recognize the existing condition of affairs, and adapt laws and procedure to such conditions. The demand of the age is for greater simplicity, both in the law and in the practice, and this demand must be heeded, and if not acceded to by the profession, they will no longer be the leaders but will be obliged to follow the steps of those who are unfit for, and incapable of, framing laws or constitutions.

There is a decided indisposition on the part of the individual lawyer to devote either time or attention to the amendment of the law in any respect, and he, therefore, resigns himself to a condition of inertia, which, from absolute indifference, soon becomes active opposition to any effort on the part of his brethren to reform either the substance or the administration of the law; contenting himself with the view that present conditions have existed for nearly a thousand years, and that any change or amendment is not only disadvantageous but will be dangerous.

As a profession, we are not up to the times; our leaders are too much engrossed in their practice to give this subject their personal attention; those who manifest an interest in the subject find the majority of their brethren wedded to existing conditions; and the organization of the courts, the regulation of the practice and the enactment of the statutes, are left very largely to men who are indifferent lawyers, although exceedingly able politicians, not to say eminent statesmen.

The truth is, and it should be enforced on every proper occasion that the lawyers of these United States, as a

body, do not exhibit a proper public spirit in performing the duty which they owe to the community by way of enforcing a careful, thorough and complete revision of the laws, State and Federal, and insisting upon the simplifying and rendering less expensive the existing methods of procedure.

The indisposition of the Bar to give sufficient time and attention to the science of jurisprudence, the enactment of statutes and the proper constitution of the courts, is a conceded lamentable fact; and so far as it has become a spirit of opposition to necessary reforms it is to be criticised and deprecated. I can only presume that your Bar is so liberal in its views, modern in its spirit, and progressive in its methods, that I may thereby be relieved from even the suspicion of comment or criticism.

That our statute books are full of crude, illy-considered, unintelligible, inconsistent and obsolete laws, is conceded. That this is a disgrace to our civilization does not seem to be appreciated. That it is the duty of the Bar to remedy it does not appear to be seriously considered. Yet here is a field which can be most profitably occupied without creating objection, or arousing antagonism from any quarter.

It is the province of the Bar Associations to correct this evil; to educate the sentiment and enforce the views of its members who are in sympathy with modern ideas; to formulate the plan and regulate the manner and method in which the law shall be condensed, revised and simplified; and in so doing it will conserve the highest and most important interests of the Bar, the Bench and the State.

This demands careful, painstaking and unremitting

labor, carried on with a due spirit of reverence for the past, with a large measure of wisdom and prudence as to the present, and a wise forecast for the future.

#### Obstacles to Work of Associations.

The practical question is, "In what manner can a Bar Association best accomplish the ends of its existence?" and in answer to this question we must not overlook the obstacles to be met and overcome.

There is a most formidable obstacle in the way of effective action, even when the members of the profession are agreed upon a course of action which involves any change in existing methods, however slight, or however beneficial. This is the difficulty in obtaining necessary legislation for the purpose of carrying out any needed reform. Without reflection upon, or experience with regard to, this matter, it would be assumed that opposition to action recommended by an association of members of the Bar would most likely arise from other than members of the profession; and that where reforms had been agreed upon, after careful consideration by an organized body of lawyers, there would be little or no opposition from the Bar. The contrary, however, is the fact, demonstrated by experience, and it is found that lawyers who are members of Legislative bodies are most sensitive to any change recommended by members of the Bar, and most difficult to win over from active opposition to any plan which has been adopted by Bar Associations. This seems to result from two conditions:

First, many of the lawyers who are influential in Legislative bodies are political leaders, and, as such, have to a very great extent put aside their professional pride and their personality as members of the Bar, and devote themselves exclusively to the profession of statesman-

ship. A proposition which is not partisan in its character, or which fails to confer a personal benefit upon some constituent, or which is not likely to secure votes at the caucus or the polls, is not deemed worthy of consideration. Hence they are unwilling to give either time or attention sufficient for the examination of the wisdom or propriety of any reform, and are likely to become active opponents of proposed measures because they have not and will not carefully examine the merits of the matter presented.

Moreover, lawyers as a body, are much inclined to criticise the labor of others, particularly members of the profession; and when an act, drawn by a committee of a Bar Association and approved by that body, is presented for action, lawyers in the Legislature are very much inclined to carp at and cavil about both the form and substance of the provision, although approving hundreds of bills during each session which are not at all creditable to either their literary taste or legal judgment.

On the other hand, there are to be found in Legislative bodies many broad, progressive, liberal-minded men who take up matters of this character with a will, and who are disposed, through pride in their profession and belief in the necessity for reform in the law, to press matters to a successful issue. It is to such that we owe the fact that Bar Associations have a standing in Legislative bodies; that lawyers, as such, have their legitimate influence, and that any progress whatever is made in the direction of law reform.

#### National, State and Local Associations.

The work of the National, of State and of local Bar Associations necessarily differ somewhat in character. An association of lawyers from every State in the Union

must necessarily have somewhat different aims from one in which the membership is confined to a single State or locality. So a local Association organized from the Bar of a county or city, has, to a considerable extent, other and different purposes from those which mainly occupy the attention of a State Association; which, with its field not so broad as that of a National body, but more enlarged than that of a locality, has within its purview many matters which are not relevant or proper to be considered by either of the others.

To illustrate: The American Bar Association, drawing upon every State and Territory for its membership, and having chief among its objects the promotion of uniformity of legislation throughout the Union, has a broader field than any State organization, and its methods, by reason of this fact and the wide distribution of its membership, must to a considerable extent differ from those of any other like body. That Association acts chiefly through the papers submitted to, and discussions had at, its annual meetings, and the inquiry, investigation and reports of its standing and special committees. It undertakes to influence Legislative action to only a limited extent through direct action, and in doing so is confined mainly to such legislation as can be enacted at Washington and which will affect the powers or jurisdiction of the Federal tribunals. Hence, this Association may be said to work mainly through its moral influence upon the Bar and the public, by creating a sentiment upon a given topic, and thus bringing about changes and reforms in matters of interest and importance to the lawyer and the client throughout the country.

Again, the Association of the Bar of the City of New York has no literary side to its work, but is solely a social and business organization, existing for ethical pur-

poses as well, and devoted very largely to maintaining a high standard of integrity at the Bar, and opposing the elevation of incompetent or corrupt men to the Bench. While not in full sympathy with the views entertained by this Association in every case, it deserves to be said that it is a terror to evil-doers at the Bar or upon the Bench. It must be added that this Association also devotes itself to a careful and rigid examination of the bills presented to the New York Legislature affecting the interests of the Bar and the public; and fearlessly and effectually interposes its objections to whatever is regarded as improper or vicious legislation. It is enabled to perform this work in a most thorough and satisfactory manner by reason of the facility for obtaining meetings of the committee having this matter in charge, which is not possible in case of a State Association; and by its numbers and standing is able to undertake and accomplish much that is ordinarily outside the scope and beyond the power of a purely local association.

The ownership of a valuable library in an accessible locality in most desirable quarters, makes the rooms of this Association valuable for professional work—in which respect it is somewhat unique among Bar Associations.

As to the responsibilities of a State Association, I can best carry out the purposes of this paper by briefly referring to the work carried on and the methods adopted by the New York State Bar Association. I feel at liberty to do so only by reason of the kind suggestion which accompanied the invitation to address you, that, as a member of that body I am somewhat acquainted with the character of its work, and the manner in which it has been sought to be accomplished. I may be excused, therefore, in stating some of the recent efforts in the way of re-

form in the law and its administration, and their results; rather than confining myself to a purely theoretical view of the subject.

#### The Work of the State Association Illustrated.

The New York Association entered more actively upon the work of reform in the law and procedure in 1890. At the annual meeting in that year a paper was read entitled "What shall be done to relieve our courts?" in which it was urged that a Constitutional Commission should be appointed to report a new judiciary article for adoption by the people. This was followed by the appointment of a committee for the purpose of drafting an act and obtaining such legislation. This became a law and such a commission was appointed by Governor Hill, a former President of the Association, and in which the Association was very largely represented. A new judiciary article was framed by this body which, although not acted upon at that time, became the basis for the article adopted by the Convention of 1894. The Association continued the agitation of the question of reform in the judiciary by making that subject a topic for discussion at two of its annual meetings, at which leading members of the Bar throughout the State presented arguments and papers. A Constitutional Convention having at length been provided for, a committee of the Association was charged with the duty of presenting the views of the Association with regard to the judiciary. This committee urged substantially the plan which had been proposed by the Constitutional Commission of 1890, and its recommendations, with a single exception, were embodied in the provisions relative to the re-organization of the judiciary, which became part of the Constitution as adopted by the people.

In 1891, the attention of the Association was called to the reports of the decisions of the Courts of the State—nine sets of reports then being issued, many of them duplicates.

As in the case of the Constitutional Amendment, a committee was appointed to take the matter in charge, and this resulted in such legislation, and bringing about of such concert of action among the reporters and publishers, that the official reports now in existence are known as the Combined Series, consisting of the reports of the Court of Appeals, of the Supreme Court and of the Inferior Courts of Record, each constituting a series complete in itself, but issued in weekly numbers at very moderate prices; these pamphlets being subsequently replaced by bound volumes, giving a system equal, if not superior to that existing in any State or country.

The Association also took an active part in procuring the abolition of engrossing of Legislative Acts before signature by the Speaker, Lieutenant Governor and Governor; recommending the substitution of the printed bill for that purpose. This was brought about by joint action of both Houses, following a discussion of the question at the annual meeting of the Association, and the passage of a resolution strongly advocating the change.

The loose manner of drafting laws and the careless method of their enactment could not well escape the attention of the Bar, and from time to time the Committee on Law Reform has made inquiry and conducted investigation as to the policy pursued in other States and countries; with but little aid, however, except from the English practice of employment of Parliamentary Counsel. Out of this inquiry arose recommendations which were substantially enacted, providing that the Commissioners of Statutory Revision should act as counsel to the mem-



bers of the Legislature and the Governor in the drafting, examination and approval of bills.

A little later began an agitation in favor of a more thorough system of examination for admission to the Bar. At the annual meeting of the Association, the deans of the several law schools of the State read papers advocating the movement and it has resulted in the enactment of a statute, providing for the appointment of a permanent commission to examine such applicants; the members of which receive a stated compensation, and whose duty it is to formulate proper rules and regulations for that purpose. Their recommendation is a condition precedent to admission to practice, furnishing a uniform system of examination, which has been found to work in the interest of both the student and the lawyer, and must ultimately be highly beneficial to the client.

The Code of Procedure of New York, by reason of changes made from the original draft by David Dudley Field, and in opposition to his views, has become complex, complicated and cumbersome. In 1894, the President of the Association, in his annual address, recommended that action be taken for the purpose of bringing about a revision and simplification of the practice. The subject was taken up by the Committee on Law Reform, which reported favorably upon the subject; and it was made a matter for discussion at the last annual meeting, when a bill which was submitted by the committee, providing for the appointment of three Commissioners to revise the Code, was recommended for passage and the committee charged with procuring its enactment. This bill became a law, and the Governor of the State has just appointed the three Commissioners provided by its terms, thus putting the State in the way of obtaining a revision and simplification of its procedure.

The methods pursued in bringing about these results have been already indicated. They are, in brief, in the first instance, to present the matter to the Association in a paper prepared usually by some member of the Committee on Law Reform, reflecting the views of its members, but not authoritative as such. This is followed by a reference to that committee for consideration and action, and a report follows, by which the subject is usually placed upon the programme for consideration at the annual meeting; and when favorably passed upon, the committee originally reporting is put in charge of the necessary legislation to carry out the views of the Association. The committee has usually appointed a sub-committee to take charge of the specific matter and carry on correspondence with the other members of the committee and of the Association, and members of the Legislature, with reference to the proposed enactment. It has, in some instances, been found desirable, in addition to the personal efforts of the members of the committee to call the attention of the members of the Association and of the Bar generally, by a circular letter, to the proposed enactment, asking their opinion and endorsement. In such cases a postal directed to the chairman of the committee, printed so as to leave a proper blank for the member to insert his views, has accompanied the circular, and upon receipt of the answers the chairman and other members of the committee have appeared before the committee of the Legislature having the matter in charge. It has also been necessary at times to present the subject to the Governor and procure his approval.

#### Importance of Committee Work.

The methods of work must, of course, vary with the specific matter in hand, but by far the most serious diffi-

culty to be met in connection with active practical work of an association in procuring proper legislation such as it may recommend, is to be found in the indifference of members to the calls upon them by the respective committees, and, unless extraordinary care is taken in the formation of the committees, much embarrassment arises in obtaining a sufficient number of men willing to take active and energetic interest in the affairs committed to their charge. But as the members acquire confidence in the methods adopted and become encouraged by the results obtained and the committees come to understand that their labors are appreciated and acted upon, there comes a decidedly increased interest, and very much stronger disposition toward effective action, which, later, ripens into something like enthusiasm for the work, coupled with a justifiable and honest pride in its results. The committee work necessarily falls upon a very limited number, but the support of the entire committee is necessary to enable its active members to give character and strength to its suggestions and recommendations. Names selected solely by reason of locality, influential connections or marked ability, are not in many instances those likely to be most useful in the work of committees of this character. In no part of the work of the Association, however, is greater care necessary than in the selection of the committees who have in charge the securing of proper legislative action; and no committee can be charged with more important duties than that which "shall consider and report to the Association such amendments to the law as they shall deem beneficial, oppose such as they shall deem injurious, observe the practical working of the judicial system of the State and recommend from time to time such action as they shall deem best."

### Essentials to Success.

But, beyond these considerations, among the essentials to success in the practical work of the Association are:

First, unanimity and harmony of action. It will be impossible to accomplish results where action is recommended by a bare majority against the wishes of a powerful and energetic minority, who will frequently be much more interested in defeating a measure than its friends in securing its passage, and, on the other hand, a minority does well to bear in mind that it should bow gracefully and unqualifiedly to the will of the majority, and that nothing can be accomplished in an association of this character except by the hearty co-operation of all its members. The moral to be drawn from this suggestion, perhaps, is that it is impolitic and unwise to attempt to bring about radical changes or decided reforms except in those instances where there is a substantial consensus of opinion among the members of the Association.

The second suggestion is that the efforts of the Association as a whole, and of its members and committees, must be directed to, and concentrated upon, the more important matters; and that the energies of the body cannot be wasted upon a number of minor and unimportant details, in which very few persons will be interested, and which are, in themselves, of no great importance. It is necessary to arouse the sentiment of the Bar in favor of some needed reform which is apparent to all and which is calculated to awaken the interest of the entire profession. Great danger exists that the efforts of the entire body will be frittered away in procuring the enactment of legislation of trifling importance, perhaps only affect-

ing individual interests. This can only be avoided by the adoption of an inflexible rule that the Association will not act upon matters except those of public interest and importance, affecting the rights, obligations and remedies of the whole body of citizens, and having some relation to the people of the entire Commonwealth.

Again, I need only advert to the necessity, on the part of the officers and committees charged with the performance of any duty, of persevering labor and untiring vigilance. Nothing is more discouraging than the efforts to bring about a reform which is universally conceded to be desirable and necessary, but yet arouses no special degree of interest or enthusiasm in any except its active promoters. The temptation is great on the part of those charged with a duty of this character to feel that their obligation does not extend beyond its presentation to the proper authorities, and that in case the Bar, as individuals, or the Association, as a whole, does not exhibit that degree of interest which the occasion demands, the committee is absolved from further labors and responsibilities. If such a spirit is indulged in, it will be fatal to success. The time and labor necessary to accomplish results are known only to those who have experienced the difficulties and discouragements of the work.

Still further, and of the last importance, is the necessity for full confidence in, and hearty support of, the officers and committees charged with any given duty, by the members of the Association individually, and by the Association, as an organization. In such case only, can the Association obtain that degree of authority to which it is entitled; and the influence of such co-operation upon the officers and committees in enabling them to carry out the wishes of the organization is not only desirable but absolutely necessary. It is only by a long pull, a

strong pull and a pull all together, that a Bar Association is able to accomplish any results in any field, and a failure to accord to those undertaking to carry out the measures resolved upon, the warmest sympathy, heartiest support and highest degree of confidence, effectually dampens enthusiasm, discourages effort and invites defeat.

#### The Future of the Pennsylvania Association.

Presenting my excuses for the apparently didactic manner of this paper and for its reference to the experience of other Associations, as only justified by the practical purpose for which it is intended, I congratulate you upon the formation of this Association, upon the interest manifested in it by your presence and enthusiasm and upon the genuine success of your first annual meeting. I can only express the wish, coupled with the confident expectation that the Bar of Pennsylvania, which has always maintained so high a standard of education, ability and professional honor, will make this Association most creditable to lawyers, helpful to courts and beneficial to clients, thus fully realizing the highest and best results possible to be attained by the association of members of the Bar.

## *Legal Education and Admission to the Bar.*

*By Prof. George Wharton Pepper.*

Ralph Stone, Esq., of Michigan, recently read a most interesting paper before the New York State Bar Association on "The Mission of State Bar Associations" (1). The address was a thoughtful one, and it is a significant fact in connection with it that the author considers the primary mission of a Bar Association to be in the field of legal education. "There is," said Mr. Stone, "no legal problem before the lawyers of this country to-day that should receive more attention than this. On its solution depends the future, first, of American jurisprudence and, second, in a very great degree, of the social and business and commercial interests of the people, since lawyers, of necessity, influence legislation more than any other class." It is, therefore, peculiarly fitting that the Pennsylvania Bar Association, in its first annual gathering assembled, should devote at least a portion of its time to the consideration of certain problems in legal education and certain practical questions with respect to the standard of preparation required of candidates for admission to the Bar.

With this end in view, I propose, first, to say a few words in regard to methods of legal study which have prevailed in the past and to consider how far, if at all, the conditions of legal study have changed in our own

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1. See LII Legal Intelligencer, p. 185.

time; second, to review the efforts that are being made throughout the country, and in this Commonwealth, to accommodate legal instructions to existing conditions, and, third, to suggest certain practical considerations with respect to legal study in Pennsylvania and the relation of the Bar Association to that important subject.

I. In referring to methods of legal study which have prevailed in the past, I have no intention of rehearsing in your hearing the now familiar story of the growth of the English system of studying law and of the rise of the Inns of Chanceries and of the Inns of Court. I suppose that this story will always represent to the English-speaking lawyer the romance of the history of the law. It is connection with these "noblest nurseries of humanity and liberty" that our imaginations like to picture the legal giants of the past, fitting themselves by a long and arduous course of preliminary training for the mighty legal feats, which they are destined thereafter to accomplish in a wider arena. Many a pen has traced the quaint and pleasing picture. By no one has the outline of the story been more gracefully given than by one of the officers of this Bar Association, Samuel Dickson, Esq., in his address on "The Methods of Legal Education," delivered four years ago before the Law School of the University of Pennsylvania. He there describes that sanctum sanctorum—the Middle and Inner Temple, about which literary as well as profession associations are thickly clustered. He reminds us of the worthies who there gained their first acquaintance with the common law, and especially of Blackstone, who wrote part of his Commentaries at No. 2 Brick Court, "in spite," as Mr. Dickson puts it, "of the noise made overhead by Goldsmith and his friends, who played blind man's buff before supper and wound up with dancing." Our pur-



pose is more strictly a practical one and, therefore, we cannot permit our minds to dwell long upon the pictures which such descriptions call before the inward eye. To us, however, it will always be an interesting and significant fact that the learning of the Temple and the inspiration which must have come from work done amidst such surroundings has found its way in direct line of descent into the very midst of our own Commonwealth, in virtue of the circumstance that many of those Pennsylvania lawyers whose names we most revere received their legal education in the Inns of Court and studied at the feet of the Gamaliels who adorned the English bench in the last century (1).

When I speak of methods of education that have prevailed in the past, I have in mind a much more recent past than that to which I have just adverted. I refer to the office system of instruction which (having its counterpart in the mother country and in sister States) once represented the only road along which students of the law could travel. To some extent, perhaps, the system still exists in Pennsylvania, and elsewhere, but the changes that have taken place in the administration of the ordinary law office and the rise of the modern law school seem to indicate that the system is obsolescent—if not altogether obsolete. I can readily imagine that there are many among you who question the accuracy of the statement just made. They would doubtless seek to contradict it by pointing to the hundreds and hundreds of students registered in the offices of practicing members of the Bar throughout this great Commonwealth at the present time, the head of the office being their pre-

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1. The Bar is familiar with the *History of the Antiquities of Inns of Court*, first published in 1790. The latest work on this subject is Loftie's *Inns of Court*. London: 1895.

ceptor of record and charged (in name at least) with the responsibility of directing their studies. In referring to the system of office instruction, however, I had in mind a relation between preceptor and student which is not merely nominal but real. I am aware that the custom of office registration is still general and that there are many portions of the Commonwealth in which it may be said to be universal. In the old days, however, there was an almost feudal relationship between the law-lord and student. The preceptor actually mapped out the course of study and actually supervised the reading of the student. Regular quizzes were given and given frequently. There was constant intercourse in those days between the head of the office and the merest tyro who was opening his Blackstone for the first time. In return for this instruction and guidance, the student performed services of real value to his preceptor. Before stenography was common, before the typewriter was invented and before printing was commonly resorted to, as it is now, in the preparation of legal documents and briefs of various sorts, the student did the writing of the office, copied letters, wrote briefs, prepared pleadings and, in many instances, drew deeds of conveyance and other title papers. An intelligent attention to this routine office work resulted in giving to the student a training in the principles and practice of his chosen profession which, when tested by its results, unquestionably supplied the Bar with a body of trained and competent lawyers.

But to-day the mere fact that numbers of students are registered in numbers of offices throughout the Commonwealth is a fact, which, in itself, gives us little or no information about the alleged decadence of the system of instruction which I have outlined. The true state of the case, as I understand it, is that in the average modern

law office, whether in great city or smaller town, the time consumed in attention to office work is so great that the preceptor has little or no time to devote to the serious task of instruction; and, so far as the preceptor himself is concerned, the student derives no benefit from working within the sphere of his influence. The introduction of modern business methods into the law office and the general employment of stenographers and typewriters has put upon other shoulders the tasks which formerly fell to the student's share, and as far as the work of running the office and administering its business is concerned, the student has, in most instances, become the fifth wheel of the conveyance. In the City of Philadelphia, the offices where careful and systematic instruction is given to the student by responsible persons, may be counted upon one's fingers. I use the expression "responsible persons" in view of the fact that, in some offices, where the system nominally survives the duty of quizzing is wholly delegated to clerks or assistants of very moderate intellectual ability, and of very slight legal attainment. There are many cases in my personal knowledge, in which the student during the three years of his tutelage never once came in contact with his nominal preceptor, in regard to legal matters, and the relation between them (excepting in so far as it existed on paper) consisted in the exchange of conventional greetings.

Upon the whole, therefore, I have ventured to assert that the office system of instruction is, or is fast becoming, a thing of the past. I do not mean to assert that it has been abandoned because it was inefficient. In many respects it was a better system than any which compete for its place. My belief, however, is that a change of conditions has made its continuance a practical impossibility. Its revival, therefore, need not be discussed. If

the circumstances under which the modern lawyer practices his profession have led to the decay of the office system, any effort to reinstate it must fail unless we are prepared to undertake the very serious task of effecting a radical modification of modern professional methods.

I venture to suggest, also, the thought that the rapid growth and development of the law during the last half century and the multiplication of new fields within which legal principles must be applied, have led to a demand for a system of instruction more comprehensive in its scope than that which was given under the older system. In the old days the student read his Blackstone and Kent and grappled with Coke upon Littleton and Fearn on Remainders. Sometimes Story's text-books on Equity and Contracts were put in his hands, but the office quizzes as a rule were confined to the law of property and to the intricacies of practice and pleading at law. Blackstone's single chapter on Corporations was thought to be a sufficient treatment of that branch of the law for the student's purpose and the great commentator's summary of the law of contracts in another chapter represented the extent to which it was thought desirable that the student should dip into that particular fountain of learning. The separate study of torts as a body of law was not then common. Special developments of the law of contracts—such as insurance, bills and notes, partnership, the contracts of carriers and the like were not specifically included in the student's curriculum. Constitutional law was taught in its elements, but constitutional law, when the office system was at its height, was a body of law far less formidable in its bulk (although perhaps its outlines were no less grand and imposing) than the constitutional law which we know today. A *laudator temporis acti* would, perhaps, sum up

the situation by saying that, in the old days, it was a case, not of many things, but of much. In a sense this is true. A few things were taught, but they were taught thoroughly and well. At the same time the stage of development, which the law had reached, made it possible to disregard the many things for the few, without leaving a serious gap or hiatus in the student's preparation. One or two quizzes a week enabled the preceptor to give to his students all the guidance that was necessary and the narrow range of subjects made it possible to conduct an exhaustive examination into the underlying principles of the subjects of study. I think it may safely be said under the conditions that prevail to-day that, in the vast majority of cases, so meagre a supervision of the preparatory work as is represented by two or three quizzes a week will result in bringing to the Bar students, whose preparation has been fragmentary and lacking in symmetry and proportion, in the sense that their familiarity with a given subject of fundamental importance is greater or less as the case may be than their familiarity with another subject of equal importance. What they have learned as the result of their own unaided efforts, they have learned after wasting a great deal of time in floundering about in mire from which a helping hand might readily have extracted them. Whole fields of law are terra incognita to students who complete their studies (if the word "complete" can be used in such a connection) without the advantage of intelligent advice in mapping out a course of study and constant assistance in prosecuting it. I know that there are many who will reply that a student's legal education begins only upon admission to the Bar and that, for practical purposes, it makes little difference whether or not he is wholly ignorant of the laws of the Commonwealth at the time he

takes his oath to support them. This proposition would probably not be seriously maintained by any intelligent person in all its baldness; for, if it were, the logical conclusion would be that preparatory study and examinations for admission to the Bar might be forthwith abolished and that the only requirement insisted upon as a condition of entering upon the practice of law should be (in imitation of the rule prevailing in many of our Western States) the possession of a good moral character and an unlimited amount of assurance. Probably the real view of many of those who make this extreme assertion is merely that preliminary study should be aimed primarily at the acquisition of a knowledge of legal principles in their application to legal problems of ordinary occurrence, and that the student should not be expected to be possessed of extensive and minute information upon a great variety of legal subjects. In other words, they but echo the exclamation of Lord Coke: "God forbid that counsel should know the whole law." While uniting in this pious ejaculation, we must not forget that sooner or later legal knowledge must be acquired by study and not by attrition and that there are vast domains of legal knowledge which may profitably be explored otherwise than in connection with active practice. It should seem, therefore, to be the part of wisdom so to utilize the three years, set apart under our system for legal study as to enable the student to gain a maximum knowledge of legal principles and to explore as many important fields as possible before the distractions of active work begin. In other words, it surely cannot be seriously disputed that it is an advantage to come to the Bar with a large stock of previously acquired legal knowledge; although it should seem that even this proposition would be denied by those who advocate the extreme view above

adverted to. Of course a student cannot master the whole law. Under our system of jurisprudence it is even doubtful if such a result can be accomplished in a lifetime (1). But the conclusion from this consideration is merely that we must have before us a problem of selection as to what the student shall study and a problem of method as to how he shall do it. This is another way of saying, so far as the problem of selection is concerned, that it is necessary to determine what we mean by the proposition referred to a moment ago, that the student of law should familiarize himself with the application of legal principles to problems of "ordinary occurrence." What are the problems of "ordinary occurrence" in the practice of the modern lawyer? To answer this question careful observation and much thought are undoubtedly necessary. It is, to say the least, just as important that the student who comes to the Bar to-day should know (for example) what is meant by the proposition that the capital stock of a corporation is a trust fund for the payment of creditors as it is that he should know the points of distinction between a contingent remainder and an executory devise. It is as likely that the young lawyer's first client will be anxious to have his rights ascertained and defined as a stockholder in, or the creditor of, a corporation, as that he will be a landed proprietor with a trust to settle or a will to make. The old-fashioned idea that no lawyer need familiarize himself with corporation law until he has been twenty-five years at the Bar is inapplicable to a commercial condition, where corporations of all sizes, great and petty, carry on an increasing proportion of the business of everyday life. This means that in solving our problem of selection, we

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1. Ihling: cited by Committee of Am. Bar. Assoc., p. 335 of Vol. XIV of Reports.

must select for the student the field of corporation law as a field in which at least some of his time must be spent. A similar observation applies to other special subjects, which twenty-five or fifty years ago were justly thought unnecessary to the student's education. All that I plead for is a recognition of the fact that American jurisprudence is developing; that almost every year brings a change in relative importance of the various subjects of legal study, and I assert that it is unintelligent to assume that the student's curriculum of half a century ago is the curriculum best adapted to modern conditions as it would be to assume that a medical student could gain an adequate knowledge of medical science by following a course of study prescribed before the recent advances of knowledge in respect of the propagation of germ diseases and the possibilities of antiseptic surgery.

I think, therefore, that it may be said with confidence, as the result of the foregoing considerations, that the conditions of legal study have changed and that they have changed because of the decline of the office system of instruction, and I think we can say further that the office system of instruction has become and is becoming less and less effective for two reasons: first, because the introduction of modern business methods into legal practice makes it impossible to give to the student the place in the office which he once occupied; and, second, because the multiplication of subjects of study makes it impossible for the preceptor to spare the time and attention necessary for the direction of the student's work. This leads me to speak of the efforts that are being made throughout the country, and in this Commonwealth, to accommodate legal instruction to the changed conditions.

II. It is to the operation of the causes to which I have



referred above that we must attribute the great increase in the number and importance of law schools throughout the country. In the Reports of the American Bar Association for 1891, Vol. XIV, a tabular statement is inserted at page 353, which shows that between the years 1878 and 1890 no less than seventy-four distinct schools of law were, at different times, in existence and in operation in the United States. It is, in my judgment, most unphilosophical to attribute the decline of the office system of instruction to the growth of the law schools. It seems far more natural to suppose that instruction in these institutions is being supplied to meet a demand which is felt throughout the length and breadth of the country. These schools differ greatly among themselves. In some, the course is for one year only; in some, the course is two years, and, in others, three. In some instances, entrance examinations are required before the student can matriculate, but, in the great majority of cases, these entrance examinations are so elementary in their character that almost any school boy could pass them, and President Eliot, of Harvard, was substantially right when he said that into most American law schools a man "can walk from the street." They have sprung up here and there in response to a local demand for help and guidance in the prosecution of legal study. For a long time, there was no organized effort to bring about co-operation among them in the direction of solving our problem of selection—in agreeing, that is, upon a course of study; and even to-day there is but little effort to bring about co-operation in the solution of our problem of method—in agreeing, that is, upon the way in which instruction can best be given. Within the last six years, however, the American Bar Association has been doing noble work in these fields. Its Committee on Legal Education

has devoted much time and thought to the task of gathering statistics from all over the world and of drawing from them such conclusions as form the basis for suggestion and recommendation. The establishment of a Section on Legal Education by the American Bar Association is another sign of the times in this connection.

If we take our own Commonwealth as an illustration we find that the demand for law school instruction led to the re-organization in 1850 of the Department of Law of the University of Pennsylvania which had been founded in Philadelphia in 1790. Prior to 1850, the system of office instruction was so efficient that the need of a law school was not felt. When it was re-organized under Chief Justice Sharswood, it was to a great extent an adjunct of the office system and so continued for many years (1). As time went on, the students came to lean less and less upon the office instruction and more and more upon that which the law school afforded, until today the connection between offices and law school is largely nominal; for, although most of the students, now numbering nearly three hundred, are registered in the various offices in Philadelphia, they get little or no legal instruction outside the lecture rooms and library, and in many instances, the students dispense with the formality of office registration altogether. In the Law School of the University will be found students from many of the counties of Pennsylvania and many students from neighboring States. The course is a three years' course, and the curriculum is carefully graded in order to afford to the students a means of gaining a comprehensive and thorough knowledge of legal principles in their practical

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1. See "An Historical Sketch of the Law Department of the University of Pennsylvania." By Hampton F. Carson, Esq., now a member of the Faculty of that institution, Philadelphia, 1882.

application to the affairs of life. The course of study for the first year comprises contracts, torts, crimes, property, pleading and elementary equity. For the second year, it comprises constitutional law, evidence, equity, property, sales, quasi-contracts, negotiable paper, bailments and carriers. In the third year, the courses on constitutional law, evidence and equity are continued and, in addition, instruction is given in equity practice and pleading, partnership, decedents' estates, corporations, insurance, Smith's Leading Cases, practice at law, agency, domestic relations and in suretyship and mortgage. In the third year the courses in constitutional law, evidence and equity are compulsory but the students may select among the remaining courses any five which they desire.

The system of instruction includes, in addition to lectures and quizzes, the viva voce discussion of selected decisions by instructor and students—the discussion being conducted in such a way as to bring home to the mind of the student the fact that the law is growing and developing science and that, in studying law, the student is engaged in the study of a department of history. Thus, in order to gain a knowledge of a given legal doctrine, the student is taught to read the successive decisions, which mark the various stages of the development of the doctrine from the time that it first made its appearance until it reached its present condition. The student is thus enabled to catch the spirit, which animates the law and is in a position to predict the line of future development which the courts may be expected to follow in dealing with the doctrine in question. This Socratic method of teaching the law, which compels the students, not merely in their hours of preparation but during the hours of actual instruction, to grapple with

problems consisting of the application of general principles to the facts of particular cases, is a method of instruction which is fast superseding the older method of oral instruction by means of formal lectures or by means of text-book study and the reading of commentaries and treatises. This modern solution of the problem of method which we set before ourselves a few minutes ago, represents the application to legal training of methods of instruction which are well recognized in other fields of study, as being in accordance with the canons of educational science (1). One great advantage which is found to follow from a consistent application of this method is the readiness with which the student upon coming to deal with cases in actual litigation is able to apply to them the principles which should underlie their decision. The disadvantage of lecture-instruction and text-book study is that the student lives in a world of abstractions in which a series of principles is unfolded before his eyes without the wholesome labor of extracting principles by quarrying them from the judicial decisions in which they have been recognized. Under the text-book or lecture system the student is more or less frequently referred to cases as authorities for propositions advanced by the lecturer or writer, but he is not compelled to do the original work himself and he is in the position of one who attempts to study practical chemistry without conducting original research in the laboratory, or of one who endeavors to learn conveyancing by a mere reading of a treatise on deeds and mortgages.

Another great advantage of the method of instruction by original research is to emphasize the importance of

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1. See a paper by the present writer in the *American Law Register and Review* for 1894, entitled "The Place of Original Research in Legal Education."

principle in the solution of a legal problem presented to the mind, as distinguished from an undue deference to decided cases. This point was made admirably clear by Sir Frederick Pollock, the distinguished professor of jurisprudence at Oxford University, in the address delivered by him a few days ago before the Harvard Law School (1). The great disadvantage of a system of instruction by lectures or text books is that the student comes to believe that no statement of law can be correct unless a direct decision among the adjudicated cases can be found which supports the statement in the precise form in which it comes up for discussion. The effect of such a habit of thought is to produce a generation of case lawyers, whose first thought, when a question is propounded to them, is to ransack, first, their memories and, then, the digest for particular decisions, which bear a resemblance to the case in hand. These men are never sound lawyers. They are utterly unable to appreciate the fact that the law, in a given field, may be, in effect, the result of a progressive development, which is still going forward, so that no statement of present law is accurate unless it is, so to speak, a step in advance of the last decided case. They are, except in the case of men of rare intellectual ability, incapable of bringing to bear upon the solution of the problem, the accumulated result of their own generalization from experimental study, entirely apart from the similarity or dissimilarity, upon the facts stated, between the case in hand and any case or cases reported in the books. Considerations of this kind have led to this solution of the problem of method to the

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1. The occasion was the celebration of the twenty-fifth year of Professor Langdell's connection with the Harvard Law School. This distinguished teacher has consistently advocated the method of instruction in question during this period and the credit for its final triumph is in large measure due to him.

more or less complete exclusion of all other methods at institutions scattered all over the country—as, for example, at the Harvard Law School in Cambridge, at the Columbia Law School in New York, at the Law School of our own University in Philadelphia, at the Northwestern University in Chicago, at the University of Iowa in Iowa City, and at the Leland Stanford, Jr., University in California—as well as at many other institutions of recognized standing. A careful consideration of the relative merits of different systems, with a preponderance of authority in favor of this, the inductive method of teaching law, is to be found in the papers read during the last few years before the American Bar Association and published in their annual Reports.

It seems, therefore, that the law school necessarily represents the modern method of imparting legal instruction, and I have given in outline the solution of the problem of selection and the problem of method reached by the law school of our own University as being the typical modern American Law School. It must not be supposed for a moment, however, that the attendance upon the Law School of the University of Pennsylvania represents the total number of Pennsylvania law students who are receiving law school instruction. You will find that many Pennsylvania men are registered as students in the Harvard Law School, in the Yale Law School, in the Cornell Law School, in the Columbia Law School and elsewhere. Indeed, I understand that there is a carefully planned movement on foot to establish a law school in the city of Pittsburgh, so great is the demand for law school instruction in the western part of this Commonwealth. As an instructor in the Law School of the University of Pennsylvania, I may say that it has given us pleasure to welcome within our gates the many

students from western Pennsylvania, who have come to our school to pursue their studies, and I may say that we are prepared to receive them in the future, no matter in what numbers they may come. I feel certain, however, that, if the men of western Pennsylvania establish a law school of their own, we shall find it a difficult task to afford better means of instruction than that which will be obtained there; for I am confident that it will receive the support of a Bar which, in my judgment, has no superior, if indeed, it has an equal, within the confines of this great Commonwealth.

The result of my review of the efforts that are being made throughout the country and in this Commonwealth to accommodate legal instruction to existing conditions is to establish the fact that legal instruction is generally given by means of law schools, and that wherever it is possible to do so, office instruction is in this way either supplemented or superseded. The far-seeing Committee on Legal Education of the American Bar Association had recommended as long ago as 1879 that a law school be established in every State in the Union. This recommendation has indeed not been literally carried out, yet (in the words of the Report of that Committee for 1890, Vol. XIII, page 328, "so decided has been the public and professional verdict in favor of that method of studying law that there are now about fifty law schools in the country, or more than one to each State, even with all the recent additions to the number of the latter." That there is vast room for improvement in our American law schools is a proposition which no one will seriously dispute. The evils that exist and the possibilities of redressing them are forcibly brought out in a paper in the Forum for May, 1895, in which President David Starr Jordan, of the Leland Stanford, Jr., University, writes

with vigor under the caption "Pettifogging Law Schools and an Untrained Bar." It is the conclusion of the learned Committee of the American Bar Association, from whose reports I find it necessary to quote so often, that no American can examine the data relating to legal education in Russia, Sweden, Portugal, Denmark, France, South Australia and certain other countries referred to in the report "without a feeling of mortification and of serious distress at the thought that our own country, claiming to stand in the forefront of the world, so far at least as intelligence, equal law for all men and the administration of free government are concerned, should be so far surpassed in this most important matter, alike by countries of even later origin, upon the other side of the world, using a system of law closely akin to our own, and by governments which we have been accustomed to regard as too autocratic for the proper development of a system of private law or legal education. Probably, if most American lawyers were asked respecting the profession in Russia, they would find that their chief notion on the subject was based on the story of Peter the Great still repeated in all books to illustrate our own happy condition as compared with the subjects of the Czar. According to this story, when Peter was shown the courts at Westminster Hall, and the throng of lawyers that conducted their business, he was astonished at their number and said he had but two lawyers in his vast dominion, and proposed to hang one of them as soon as he returned. But the report received from Russia, and especially the pamphlet on "Legal Education" in that country, which has been translated expressly for the Committee's use, make it certain that the law schools of the United States bear no comparison in thoroughness,



system and the scientific order of instruction with those of this autocratic government."

While, therefore, I do not contend that the American law school is a perfect institution, I do venture to assert that it is through the law school that the legal education of the future is to be conducted, and that it is our duty as prudent and patriotic citizens to study the law-school problem, and to contribute our mite to the discussion of methods of improvement and reform. The study of these problems, it seems to me, is peculiarly the province of a great Bar Association like this, and it is my earnest hope that this assemblage will not disperse until the Committee on Legal Education has been formally charged with the duty of making a patient and intelligent study of the many burning questions which we can all of us see, if we will but open our eyes.

III. The subject upon which I was asked to speak included not merely "Legal Education"—to which hitherto I have confined my attention—but also "Admission to the Bar." It is to this latter topic that I invite your attention in conclusion, at the same time that I perform the duty which I set before myself at the beginning of this discussion—the duty of suggesting "certain practical considerations with respect to legal study in Pennsylvania and the relation of the Bar Association to that important subject."

Admission to the Bar is usually gained throughout the Commonwealth upon passing an examination before a Board of Examiners selected by the judge or judges of the local courts from among the members of the Bar. This board is generally a standing committee, the term of service in which is a year or more. In Philadelphia county, with which I am most familiar, the number of members of the board is twelve, each member serving for

a year, the term of one member expiring with each month. In other counties the Board of Examiners is drawn by the court from the Bar for the purpose of conducting a particular examination, and is not a standing committee. The standard of attainment required of the student differs in the different counties of the State, probably the most searching examination being that required for admission to the Pittsburgh Bar. In some counties the examination is scarcely more than a formality, and there is an entire absence of harmony of opinion in respect of the lines upon which an examination should be conducted and the nature of the questions to which the student should be required to respond. It seems to me that this lack of harmony in the matter of entrance examinations is a serious evil, and I think that it is an evil which this Bar Association can do much to remedy. I am aware that there are many who maintain that it is proper to have a varying standard and diverse requirements for admission in the different counties upon the ground that each county has peculiarities of legal tradition and practice, and that to substitute an iron rule for the present flexible system would be a thing intolerable for the local Bars. This view was expressed by Chief Justice Paxson when he was asked to reply to the inquiry of the Committee of the American Bar Association upon the advisability of taking the power to admit to the Bar from the inferior courts and lodging it in the courts of last resort, to the end that there might be a uniform standard governing the examination of all candidates. The committee had sent to the Chief Justices of all the States a circular letter asking the question just outlined, and also inquiring their views as to the advisability of appointing a commission in each State to hold office for a term of three years, one-third of the

members to retire each year, the commission to sit at stated times and at convenient places with the state to conduct the examinations for admission. As just intimated, the Chief Justice of Pennsylvania was inclined to answer both questions in the negative. "I consider it extremely desirable," said he, "that the subject be left in the control of the inferior or local courts, by which I mean courts of record, who are most familiar with the needs of their communities and of the personal fitness of applicants." Reports of American Bar Association, Vol. XIV, 1891, page 307. It is to be observed, however, that a large majority of the Chief Justices were in favor of introducing uniformity into the examinations for admission by delegating to the State court of last resort the appointment of a commission such as has been described, for the purpose of examining candidates for the Bar. The evils of the present system were admitted by all those with whom the committee entered into correspondence. Not only are the evils resulting from lack of uniformity obvious to one who gives his attention to the matter, but the evils which proceed from impromptu examinations conducted by busy practicing lawyers are so serious that they cannot escape notice. The committee of the American Bar Association thus sums up the situation: "Every lawyer knows how very lightly the subjects of elementary law, and all such as require a systematic and accurate knowledge of it are passed, almost invariably, by a committee of lawyers taken on brief notice from the busy Bar, usually in the busiest days of the beginning term, to examine a class of applicants. There is no time to refresh their remembrance of early studies, or to form a careful and just plan of examination. After a very few calls for the definition of this or that term, so put as to involve merely verbal memory,

their inquiries are mostly prompted by cases in their recent experience, or by the latest text-books they have read. Too often they are asked almost at random, and deal with a list of scattered points rather than any important and comprehensive doctrine of the law. Almost inevitably they deal with the points contained in recent cases as most familiar to the questioner, and such law can rarely be elementary or of wide application. The very fact that it has been recently in question shows that the point was not long ago a doubtful one. To examine a class of students searchingly and yet justly so as to learn something more of them than their mere recollection of a few book phrases and a certain aptitude for guessing is not a light task, and requires careful preparation. The United States is about the only nation in the world, we believe, where it is usually permitted to be done *ex tempore*, and much of the decline in professional learning and professional character, so commonly lamented, may be traced to this lack of well trained and vigilant watchmen at the entrance gates." Again, it is a hardship for the student to be examined on three years' work at a single sitting. He should be permitted to come up at the end of each year of preparation, and pass off the subjects already studied. Many other suggestions occur to us when we give the subject attention. Largely through the influence of one who is the honored guest of this Bar Association to-night, J. Newton Fiero, Esq., the New York Legislature has, within a year, actively recognized the need for reform in the matter of admission to the Bar by providing that the examinations shall be conducted by a commission of three members appointed by the Court of Appeals, the expenses of the commission and the compensation of the commissioners

being met out of the proceeds of an examination fee charged to each student (1).

In view of these considerations, the suggestion that I have to make to the Pennsylvania Bar Association is this: That this Bar Association delegate to its Committee on Legal Education and Admission to the Bar, which, by the terms of its existence, must be composed of representative men from the different parts of the Commonwealth, the duty of formulating a curriculum or course of study to be recommended to the courts of the different counties throughout the State, and of preparing each year a standard series of examination papers upon that course, which papers can be put into the hands of such local Boards of Examiners as may see fit to use them. It will be observed that my suggestion does not contemplate any such radical change in our system as the delegation of the power to examine for the Bar to our Supreme Court, nor does it contemplate the appointment of such a commission as has been recommended by the Committee of the American Bar Association and actually created in New York. The suggestion contains no feature which threatens the right of the several counties to decide for themselves to what extent they will recognize local traditions in matters of practice and procedure. It is nothing more nor less than a suggestion that this Bar Association would do well to turn its attention to the problems of legal education and admission to the Bar, and begin a campaign of education in this Commonwealth by supplying our local Examining Boards with the results of all that is latest and best in legal educational science. In this way the local Boards would be enabled, without an expenditure of time and labor, (which

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1. See Chap. 760, Laws of 1894.

it is impossible for them to make) to lay before their students, a comprehensive and graded course of studies and finally to subject their students to a fair but searching examination of such a character as will test, not memory merely, but their understanding and their reasoning powers.

Personally, I am inclined to think that, certainly at this stage of the solution of the problem of legal education, it would be a grave mistake to advocate the erection of a central power which could control the local Bars against their will. I think that there is, under the conditions which now exist in this State, a balance of advantages in favor of the deposit of the power to admit to the Bar with the local judiciary and the delegation of that power to local Boards of Examiners. I am firmly convinced, however, that these separate boards should not be expected to add to their already onerous duties the task of solving knotty educational problems and of keeping abreast with all that is latest and best in educational science while at the same time they are immersed in the active practice of their profession. This Bar Association, with representatives from every county in the State, many of whom have served, and are serving, and will continue to serve, upon the local Boards of Examiners, is in a position to do a work of incalculable benefit to the cause of legal education by entering into correspondence with these Boards and by making common cause with them in the way that I have suggested for the attainment of the great end for which they are all striving. If a representative committee of this Association were to agree upon a course of study in the essentials of the law and in the principles of jurisprudence which are of universal application, I feel sure that a large majority of our State judiciary and of the local boards would

adopt that curriculum as the course of study required of candidates for admission. Such a committee would clearly distinguish between the study of branches of substantive law in regard to which the east and west and north and south of our Commonwealth are at one, and the study of matters of practice and procedure with respect to which a difference of opinion or custom may well prevail in different portions of the State. Our Central Committee could suggest courses in contracts, torts, real property, equity, corporations, crimes, partnership, evidence, constitutional law, wills and administration, Pennsylvania statute law, etc., etc., coupled with a recommendation of the text-books and case-books that from time to time make their appearance in these fields, together with references to such current periodical literature as will throw light upon the student's work. Such a work done by a representative body and not put forth with any assumption of the power to command or with any show of superior learning or intelligence, but solely upon the basis of that community of interest which subsists between those who are engaged in a common work, would undoubtedly command respect and would, in my judgment, receive on every hand the most careful consideration. It is my earnest hope that the Pennsylvania Bar Association will enter upon the field to which I have endeavored to direct attention, for I feel sure that no department of activity is open to us, in which there is more good work to be done and that there is none in which our efforts can be put forth with greater hope of success than in the field of Legal Education and Admission to the Bar.





## *The Local Bar Association.*

### *Its Functions and Relations to the State Bar Association.*

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*By Alex. Simpson, Jr., Esq.*

So far as the representative membership is concerned, there should be no relation between this Association and local Bar Associations. Attempts have been made in other States to form State Associations, consisting of delegates from the local Associations, but, without exception, the attempts have failed, both financially and from the standpoint of sustained interest and usefulness. Against this practical result no theoretic reasoning can hope to make head.

The relation, therefore, between the two, if any there is to be, must be discovered only in a unity purpose. It will doubtless be thought best at times to submit pending matters through our members to the local associations, that the local consensus of opinion may be had; but, in the main, it will be found that the two associations work in different fields, the one having a general purpose to conserve and the necessity for consulting a wide constituency, and the other dealing more in particulars and consulting only local desires. On the other hand, in considering the functions of the local Associations, a wide vista is opened, a retrospect of which often discloses the lines of work of this Association.

This branch of the subject may be considered historically or from the standpoint of possible practical benefit

to the Bar and the community. I have used the words "possible practical benefit" advisedly, for, in but very few instances, have such Associations measured up to their opportunities.

Historically considered, the local and State Associations alike have for their parentage the English Inns of Court, modified, of course, by our changed conditions. Several of the Inns can trace an existence of four or five centuries, but their records are incomplete, except in so far as relates to their course of studies, their dress regulations, their quaint festivals and their banquets. We know, of course, that during the whole, or nearly the whole of this time, a calling by one of the Inns was a prerequisite for admission to practice at the Bar, a function the local Associations here have wholly lost; that at times they stood foremost in opposition to tyranny and oppression until they fairly earned the bestowed encomium of "Palladiums of English Liberty," an encomium apparently not desired by our local Associations; and that, on occasions, during all these centuries, proposed Acts of Parliament affecting public justice have been considered, discussed and criticised, it would seem often with but little, if any, more effect than the perfunctory discussions we have had.

Most of our local Associations appear to have practically abandoned all but two of their functions:

(a) Keeping a law library, accessible to its members and the court; and

(b) Giving annual banquets to the Justices of the Supreme Court or to some incoming or outgoing judge of the local courts, at which fulsome eulogy and wit of a local flavor absorb the speechmaking.

At times, it is true, papers have been read at meetings of the Association; in aggravated cases, action has been

taken looking to the disbarment of guilty practitioners, and when, during Legislative session, some venturesome law reformer has endeavored to obtain what he considered a needed change, the "dry bones" have stirred, and resolutions, accompanied by addresses more or less relevant, have been duly passed and forwarded to the proper Legislative committee, to be followed in turn by a great calm, resting until the next session of the Legislature. It must be admitted that there is not in this much room for congratulation. All other profession and trades, nay, even the laboring classes in each particular occupation, have their associations and trades leagues, in which they periodically meet and practically discuss that which is for the common good; yet, aside from the banqueting days, the meetings of our local Associations are usually restricted to approving the accounts of the officers and electing their successors.

What, then, should the local Bar Association do?

Keeping a law library and maintaining it properly are, of course, necessary things. It is to be feared, however, that even these are usually done very perfunctorily, but as the subject is one rather for a congress of librarians than for a gathering of the Bar generally, it will not be discussed here.

The local Associations should, of course, see that a proper standard is required for admission to the Bar. But as every State Association, including our own last evening has been treated to learned papers on the subject, I shall pass it by without further comment.

Such Associations should meet at intervals around the festive board, where wit and humor can have full play, but where truth rather than fulsome eulogy will be heard, and where the banquetter shall be treated to a "feast of reason" as well as a "flow of soul." So long,

however, as the only theory upon which such banquets are conducted is, that they furnish an opportunity to "eat, drink and be merry," the man who "wants to know" will attend only when, for friendship's sake, he feels he must. It seems to me the method of toasting, adopted at banquets, should be exactly reversed. To illustrate: A reception and banquet is given to the Justices of the Supreme Court. At the banquet, to the toast of "The Supreme Court," the Chief Justice, or, if he be not present, one of the older Justices responds: Of course, he will not criticise his court, nor does he see any needed changes in its practice, except that he justly thinks it is overworked and in need of relief. Such matters regarding the court as the Bar is ignorant of, he studiously keeps to himself. This toast ought to be replied to by a fearless, active, practicing member of the Bar of that court. He could tell the court what might be done to improve its methods, and in so telling it, he would command an appreciative audience of court and Bar alike. And then let the Chief Justice reply to the toast, "The Bar of the Supreme Court," and let him be equally fearless in pointing out the necessity for changes by the members of that Bar. So it should also be when the local judiciary are toasted. It is certain that no merely witty speeches could be more interesting, though the picture limned invites rather than excludes true humor, and it is equally certain that the Bar, ceasing to be merely eulogistic, would lose much of its subserviency. This course would remove complaints now so often heard, that we are becoming a Bar of epicures rather than lawyers, a complaint, by the way, which, so far as it is now true, could have been made with equal force against the Inns of Court during their centuries of existence.

The preparation of a code of ethics seems rather the

work of the State Bar Association, and in several States, that work has been well done. The enforcement of such a code, however, belongs to the local Association. In the endeavor to practice law strictly according to so-called business principles, we are apt to lose sight of the fact that the law is more than a business—it is a profession. The best traditions of the Bar require a higher standard than is ordinarily found in the transactions of life between rival business men. Courtesy of the highest grade and a close adherence to the principles of the “Golden Rule” are and should be as much expected of every lawyer as it is expected that he shall be honest. Yet even this latter is overlooked. The local Associations seem only to note the most flagrant breaches of duty on the part of the practitioner. Apparently he may be a sneak, unworthy of associating with respectable men; he may lie to and deceive, the court and client, as well as his adversary; he may cite cases that never existed and those that have for principles in no way decided by them; he may be conveniently sick when his client does not wish to try; he may prepare and permit his client to swear to affidavits of defence, wherein the truth is studiously concealed; he may swindle his client under the guise of charging fees and yet the average local Association does nothing until and unless the man is proved guilty of crime. And even when it is compelled to act, if the delinquent agrees to remove from the county, he is permitted to go elsewhere within the State to repeat his wrongdoing, as if he were worthy of all that the title of lawyer should imply. The Bar of every county, but particularly those in the large cities, have suffered from an influx of such scoundrels, often armed with certificates of good character from the judge of the county from which they came. Unsparing condemnation is re-

quired here. The local Bar Association, through its censors, should unflinchingly prosecute such cases. In no other way can the high standing of the profession be maintained. Temptation lies all along the path of every lawyer; numerous opportunities for wrongdoing are afforded him at every turn, and these he will be less apt to overcome if he sees that others gain by their failure so to do and are yet unpunished. Thus, this leniency increases the wrongs it fain would hide. Far be it from me to shut the door of hope upon the man who has once offended; but it is certainly should be closed, so far as the Bar is concerned, until the offender has shown works meet for repentance; has shown that he is again able to meet and overcome the temptation which the unbounded opportunities of the Bar afford. Can anyone doubt but that much good would result if the local Bar Association prosecuted every such case to its proper punishment and, if that punishment were suspension or expulsion, certified the fact to this Association, which, in turn, certified it to the other local Associations throughout the State? It has been well said, that a lawyer should be as jealous of his professional standing as a maiden is of her honor, but the public will never believe that to be a characteristic of the Bar until the Bar compels its members to live up to that standard. If the present status of the lawyer is to maintained, common honesty requires that we shall fulfill our duty herein or publicly abandon the field to more vigilant censors.

Another neglected duty of the local Association in which, indeed, this Association is pledged to assist, is in keeping ever green the memory of those leading members of the Bar whose lives have exemplified its best traditions. Upon the walls of the library and meeting-room of each local Association should be hung the portraits

of such members as are deemed worthy, and in its records should appear an epitome of their life work. Thus environed, the coming Bar must absorb much that is best in the profession of the past.

The local Associations have a duty to perform, also, in seeing that proper court rules are adopted, and wise changes made therein from time to time. This task is somewhat beyond the duty of this Association, though it is difficult to assign a reason why a rule good for one court should not be good for another, except in those cases where the special legislation adopted prior to the Constitution of 1874 requires special rules for its enforcement. It is next to impossible for the individual lawyer to obtain needed changes, and it is often difficult for the local Association itself to do so. The Bench does not experience, as the Bar does, the difficulties growing out of inadequate or antiquated rules. Generally speaking, the judges have reached a time of life when conservatism is natural to them and change repugnant, and consequently they dislike to unlearn that which has become familiar to them. It is hard to teach an old dog new tricks, to make an old mechanic use new-fashioned tools, or to get an old judge to accept new methods of practice. This was, perhaps, as well exemplified in the old affidavit of defence rule as in any other. Theoretically speaking, one would have supposed that after a few years of successful experience in requiring defendants to make a defence under oath, if any they had, and in default to suffer a judgment for want thereof, would have resulted in the adoption of the system everywhere; yet it required over ninety-years' experience of the benefits of the Philadelphia practice and an Act of Assembly to establish it in a number of the Counties.

On the other hand, individual attempts in Philadel-

phia County to induce the Common Pleas Courts to adopt new rules; for instance, one relating to the filing of briefs, in ejectment and other real actions, similar to that approved by the Supreme Court in *Lehman vs. Howley*, 9 W. N., 386, have totally failed. The result is, I have seen hours unnecessarily spent in proving title through numerous deeds, wills and court records, when the only question at issue was, whether the defendant, who had bought the land at a sale under a municipal claim, was such an assignee of the original covenantor as to be personally liable on the covenant contained in an ancient ground-rent deed.

The Supreme Court has always been most liberal in sustaining the power of the lower courts to adopt rules to expedite business, but many of the Common Pleas Courts have been laggard in availing themselves of the opportunity. The result has been much unrest at the Bar, especially in Philadelphia County. Indeed, most of the seeming antagonism between that County and the rest of the State, on questions of practice and procedure, has been the outgrowth of inadequate court rules. As the rules are easily repealed, if found injurious, they furnish a safe method of testing changes in practice that seem desirable. It would be well for this Association to consider the question of preparing, through some committee, an ideal body of rules, or to request some prominent member to prepare a paper on the subject, accompanied by a draft of such proposed rules.

Analogous to this subject is the duty, on the part of the Bar, to watch and, as far as may be, to control legislation in matters relating to the administration of public justice. This work is peculiarly within the province of this Association, rather than of the local Associations. All such attempts have heretofore been sporadic, and



have necessarily been inefficient because of being purely local. The Bar of no one county, however great, can hope to influence legislation to any serious extent without the assistance of its fellows. The Bar of no one county can know the needs of the whole State, nor appreciate the difficulties which surround its brethren in other counties. It will be found hard enough to properly influence legislation even when the whole State is acting through this Association, a fact which the committee having charge of the Superior Court bill can amply verify. Some of the reasons for this were very carefully set forth by Mr. Fiero, last evening, and others in a paper recently read before the New York State Bar Association by Mr. Stone, Secretary of the Michigan Association; yet, when we remember that lawyers are in the majority in each branch of every Legislature, it is difficult to understand why this should be so. It would not be so if the State Bar Associations were sufficiently active to make their influence properly felt. Suppose, for instance, a bill on the subject of return days of writs, analogous to the Chester County Act of April 5, 1862, P. L., 270, were drafted and submitted to the Committee on Law Reform, discussed, remodeled and submitted by it, in turn, to every member of the Association, and to every local Bar Association, with a request for suggestions and criticism; that, from the wealth of material thus obtained the committee should draft a bill to be submitted to this Association at its next meeting, a copy thereof being sent to each member with the call for the meeting, does anyone suppose that such a bill, if adopted by any large majority here, would fail of passage in the Legislature? In this way a plebiscite of the whole State could be had, and not only would the will of the Association be carried into effect but great interest would be

aroused in its work. It seems to me that all bills on procedure and practice should be so submitted:

The local Associations have another duty to perform which may be said to be wholly neglected. It is to see that improper men do not obtain or retain a position on the Bench. It is no part of their field or labor to nominate or suggest any one for the position of judge. This would only result in jealousy and disaster, as a recent attempt in Beaver County demonstrates. But if from any cause an improper man is named, or if after a trial the judge is found to be unfitted for the place, the local Association should say so in unmistakable language. It is often urged in a cowardly way that the newspapers may be trusted to take care of such matters. But the newspapers may not be so trusted. They do not know, or are equally cowardly, for they rarely say anything on the subject if the judge is courteous, gentlemanly and condescending to their editor and representative. Usually they are superserviceable to the judge as the lawyer is himself, and are as afraid of offending him as is the *amicus curiae* "for revenue only." They do not know, what every active lawyer in the county may know, viz., that those judges always "play to the galleries," and are not respected by the leaders of the Bar or by the Supreme Court. The bald fact of a judge who is reversed in over fifty per cent. of his cases, whose decisions are so generally wrong that it is commonly said to be only necessary to state to the Supreme Court that "this is an appeal from the judgment of the Court of Common Pleas of Blank County," to be reasonably certain of reversal, is by no means unknown throughout this Commonwealth; and yet the newspapers speak, with one voice, of "Judge Lightweight" as one of the ablest judges in the State. It is a wise rule that retains on the Bench, ir-

respective of his party affiliations, the judge who has been found fitted for the place, but it often happens that with the aid of the newspapers that rule has been misapplied to cases where the prerequisite of fitness has been wholly wanting. The lacking element in the local Association on this subject is courage, yet with united action the result would be reasonably certain.

Nor, as it seems to me, can this Association hold itself aloof when the test is applied to judges of the Supreme or Superior Courts. It is true our By-Laws declare that we "shall not take any partisan political action, nor endorse or recommend any person for any official position," but this does not stand as a barrier to our putting ourselves on record in opposition to Maynardism in this State, nor hinder our condemning a judge of one of the higher courts who, originally supposed to have a judicial mind, is upon trial found to be wholly wanting.

I have thus hastily reviewed what have seemed to me to be the leading functions of the local Bar Association, and now leave the matter with you for ungloved discussion. But, after all, success in this, as in all other matters, depends on the courage, capacity and proper appreciation by the individual of his duty to the profession generally and to the community. Beyond all other men the lawyer should bear upon his shield the invocation of Theodore Parker:

"Give me the power to labor for mankind;  
Make me the mouth of such as cannot speak;  
Eyes let me be, to groping men and blind;  
A conscience to the base; and to the weak,  
Let me be hands and feet, and to the foolish, mind."

And with a zeal greater than is shown in any other associated trade or profession, just as our opportunities for public good are greater, the Bar Associations, each in its appropriate sphere, should labor together in furtherance of our avowed purpose:

"To advance the science of jurisprudence, to promote the administration of justice, to secure proper legislation, to encourage a thorough legal education, to uphold the honor and dignity of the Bar, to cultivate cordial intercourse among the lawyers of Pennsylvania, and to perpetuate the history of the profession and the memory of its members."

# PENNSYLVANIA LAW SERIES.

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*[Edited monthly by graduates and students of the Law School of the University of Pennsylvania.]*

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## NOTES.

The first annual meeting of the Pennsylvania Bar Association held at Bedford Springs, Pa., the 10th and 11th of this month, was a remarkable success. It brought together some of the best talent at the State Bar and provoked able discussions upon questions of present interest to the profession. The result of this interchange of ideas was instructive to those engaged in it, and will, it is to be hoped, make itself felt generally throughout the State. The papers read before the Association were interesting treatments of subjects of practical importance, and the original suggestions contained in them entitle them to be widely and carefully read. We print them in another part of this issue.

While speaking of the benefits of this first meeting of the Association, it is not to be forgotten that the results already apparent are not in reality the most important feature of the meeting. By demonstrating the necessity of such an organization for the education and elevation of legal sentiment and by giving the movement tangible shape, the importance of the meeting lies chiefly in the

fact that it has set in motion a force that is probably destined to be a potent factor in the future in moulding and influencing legal mind and sentiment of the State.

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"A crowd of paper lawyers" is often the expression with which a graduating class from the law school of to-day is welcomed into the arena of active life as they take up their cudgels to enter the "struggle for existence."

If this be a deserved criticism and one that continues with law school graduates as they grow old in their profession, then the law school as developed to-day has failed of its aim and we had best return outright to the old office system of instruction.

It may be the phrase is well applied to the new-blown graduate as he steps from the commencement stage "conquering and to conquer" (in his fond imagination). But we resist the idea that three years' study of the theory of law has unfitted him for the practice thereof. Granted that ever and anon there has and will occur the case of a beautiful expounder of legal theory who disappoints his friend (and clients) as a practitioner, there remains unshaken the fact that, other things being equal, he who is versed in the theory of law will learn the practical part far more readily and with far more understanding than he who knows practice only will learn theory.

The so-called practical lawyer—a misnomer, of course, for all lawyers should be practical as well as theoretical—is little more than a follower of precedents, and who, pray, set the precedents but the theorists?

Happily, the Law School of the University of Pennsylvania represents neither the one nor the other extreme. The faculty have long recognized the fact that office in-

struction on the practical side may be made useful and supplementary to the law school courses. The hours of lectures accordingly have been so arranged that the student has had the opportunity to enjoy the benefits of both systems, yet of neither to the entire exclusion of the other.

The result being, we trust, that the merits of each system have met and offset the defects of the other.

It gives us pleasure, particularly in view of the above, to publish here the list of those who have attained honors the past year at the Law School.

The prizes have been awarded as follows:

William Nelson Loflin West, to be Fellow of the Department of Law.

The Faculty prize for the best written examinations with all the professors to Benjamin C. Weinhaus, with Honorable Mention of Joseph Gilfillan, Benjamin Francis Perkins, Arthur Dickson and C. Stuart Patterson, Jr.

The P. Pemberton Morris prize for the best written examination in evidence, pleading and practice at law and in equity, to Isaac Hassler, with Honorable mention of R. Stuart Smith.

The law oration at the commencement was delivered by R. Stuart Smith, whose subject was "Law and Liberty."

The Honor List is as follows:

GRADUATING CLASS—*Summa Cum Laude.*

George Wharton Dallas, Isaac Hassler, George Von Phul Jones, William Nelson Loflin West and Benjamin Weinhaus.

*Cum Laude.*

Clifton Maloney and Pierce Mecutchen.

SECOND YEAR CLASS—*Summa Cum Laude.*

Joseph Gilfillan, Horace Lyman Henderson, Benjamin Francis Perkins.

*Cum Laude.*

William Budd Bodine, Cyrus David Foss, Jr., Thomas Sovereign Gates, Benjamin F. Mevay, Jr., George Albert Smyth.

FIRST YEAR CLASS—*Summa Cum Laude.*

Arthur Dickson, C. Stuart Patterson, Jr.

*Cum Laude.*

Frank S. Busser, Walter C. Douglass, William A. Gray, Leon Kauffman, Malcolm Lloyd.

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Progress has laid its advancing hand upon the curriculum of the Law School, change, ever the concomitant of progress, being the result.

And of these changes the greatest is undoubtedly the introduction of the elective system of lectures in the third, the last year, of the course.

That to the differentiate and specialize in the law or any other learned profession before the foundations which underlie the whole are mastered, is a narrow and short-sighted policy will scarcely be denied. By the time, however, that a student has reached the third year in his law studies he has in a great measure laid that broad foundation. If it be not strong enough to bear the huge superstructure he may hope to raise upon it, it may be strengthened from time to time. But of its height and depth we are not now speaking, of its length and breadth, rather.



Now, by the time the third year is reached, as we said, the student begins to feel that he has laid sufficient foundation to begin to gather together the mortar and bricks for his superstructure, or at least to reinforce those foundations which underlie points at which he expects to build highest. In response to his feeling, and in response to the increasing call for specialists in law as elsewhere, regrettable or otherwise as it may be viewed, the curriculum which is announced for the ensuing year has been altered so as to contain only three required courses in the third year. These are constitutional law, evidence and equity. Of elective courses there are eight. From these the student must select enough to amount, together with the required courses, to nine and a half hours of lecture a week.

The introduction of several new courses in the second and third years indicates that the Law School is broadening and deepening its work equally as rapidly as it is growing in numbers.

The complete curriculum is as follows:

*First Year.*

| Subject.                     | Hours per Week. | Lecturer.              |
|------------------------------|-----------------|------------------------|
| Torts, . . . . .             | 2               | Prof. Dallas.          |
| Contracts, . . . . .         | 2               | Prof. Carson.          |
| Property, . . . . .          | 2               | Prof. Townsend.        |
| Pleading, . . . . .          | 1               | Prof. G. S. Patterson. |
| Crimes, . . . . .            | 1               | Prof. Graham.          |
| Elementary Equity (2d term), | 1               | Prof. Bispham.         |

*Second Year.*

| Subject.                        | Hours per Week. | Lecturer.              |
|---------------------------------|-----------------|------------------------|
| Constitutional Law, . . . . .   | 1½              | Prof. C. S. Patterson. |
| Evidence, . . . . .             | 2               | Prof. Dallas.          |
| Sales, . . . . .                | 1               | Prof. Carson.          |
| Equity, . . . . .               | 1               | Prof. Bispham.         |
| Quasi Contracts, . . . . .      | 1               | Prof. G. S. Patterson. |
| Property, . . . . .             | 2               | Prof. Townsend.        |
| Bills and Notes, . . . . .      | 1               | Mr. Burr.              |
| Bailments and Carriers, . . . . | 1               | Prof. Pepper.          |

*Third Year.*

| Subject.                                             | Hours per Week. | Lecturer.              |
|------------------------------------------------------|-----------------|------------------------|
| Constitutional Law, . . . . .                        | 1½              | Prof. C. S. Patterson. |
| Evidence, . . . . .                                  | 2               | Prof. Dallas.          |
| Equity (1st term), . . . . .                         | 1               | Prof. Bispham.         |
| Equity Practice and Pleading<br>(2d term), . . . . . | 1               | Prof. Bispham.         |
| Partnership, . . . . .                               | 1               | Prof. Parsons.         |
| Decedents' Estates, . . . . .                        | 1               | Prof. Parsons.         |
| Corporations, . . . . .                              | 2               | Prof. Pepper.          |
| Insurance (1st term), . . . . .                      | 1               | Prof. Pepper.          |
| Smith's Lead. Cases (2d term), . .                   | 1               | Prof. Pepper.          |
| Practice at Law, . . . . .                           | 1               | Mr. Burr.              |
| Suretyship and Mortgage, . . .                       | 1               | Mr. Brown.             |
| Agency and Domestic Relations                        | 1               | Mr. Brown.             |

# THE QUIZ.

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It is the general purpose of this department of the Pennsylvania Law Series to direct attention briefly to such changes as from time to time shall occur in the body of the law, either through new or different applications of the principles of the common law or by means of statutory enactments.

It is intended to accomplish this, by means of a carefully prepared system of questions and answers; the questions, where practicable, being obtained from some leading specialist in that branch of the law in which the change occurs and the answers presenting the reason, as well as the substance of the change.

**Consider the Pennsylvania Statute of June 25th, 1895,  
Prohibiting the Public Employment of Aliens.**

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ACT OF JUNE 25, 1895, P. L. No. 182.

An act providing that none but citizens of the United States shall be employed in any capacity in the erection, enlargement or improvement of any public building or public work within this Commonwealth

Section 1. Be it enacted, etc., That none but citizens of the United States shall be employed in any capacity in the erection, enlargement or improvement of any public building or public work within this Commonwealth: Provided, That apprentices to a trade or profession who may be under twenty-one years of age shall not be subject to the provisions of this act: Provided, That the provisions of this act shall not apply to public works where the cost thereof is paid in whole or in part from assessment of benefits.

Section 2. The person or persons who may be by law empowered to enter into a contract for the erection, enlargement or improvement of any public building or public work shall insert in such a contract a stipulation or covenant that the provisions of section one of this act be fully complied with.

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This recent statute is one eminently fitted for criticism both from a legal and a political standpoint. What its future construction by the courts may be is well worthy of speculation. What its tendencies are and effects must

be, if carried into execution, deserve consideration. It is, therefore, under these two heads that the statute is now to be briefly considered. And first of the

### LEGAL.

The words of the statute are that "none but citizens of the United States shall be employed in any capacity in the erection, etc. \* \* \* \* \* The person or persons who may be by law empowered to enter into a contract for the erection, etc., shall insert in such a contract a stipulation or covenant that the provisions of section one of this act be fully complied with."

If this amounts to nothing more than a mere direction to the "person or persons" concerned there is no burden put, expressly or impliedly, upon the contractor—the party with whom the contract is made—to see that such a covenant is inserted. The burden will rest entirely upon that person who is authorized to make the contract and his failure to have such stipulation inserted will affect, if any one, himself alone. If, on the other hand, it amounts to a prerequisite to the contract's validity, a non-compliance will prevent the contractor from recovering on the contract. In either case, whether the officer authorized to make the contract will suffer is a question which can best be considered in a later paragraph. Indeed, this would be the only question were the conclusion reached that the statute is merely a direction. But, in the other contingency, the broader question is raised as to whether the Legislature has authority to make such a prerequisite to a municipal corporation's contracts as well as to those of its own.

There are, therefore, these two questions presented:  
I. Is the statute a mere order to certain persons or does it prescribe something essential to the valid execution

of the contract; and II. if the latter, has the Legislature authority to so restrict municipal as well as officers of the State?

I. In the construction of such a statute as the one under consideration, justice to the contractor requires a distinction to be drawn between words which specially and plainly prescribe the mode in which the contracts should be made and evidenced, and words which prescribe something else of much less importance, as in the case at bar. The very reasons which render a compliance with the former necessary do, by their total absence, render a compliance with the latter unnecessary. *Hepburn vs. City of Philadelphia*, 149 Pa., 335.

Mr. Justice Sharswood, in *Addis vs. City*, 85 Pa., 379, shows clearly the spirit by which such a decision is prompted, in saying: "We may regret that the plaintiff acted unadvisedly, but to assist him in this hard case would only lay the axe at the root of the system which imperatively requires all municipal work of this character to be done by the lowest and best bidder." It would be difficult to find "a system which imperatively requires all municipal work" of the character provided for by the statute "to be done by" a citizen of the United States; who might not and probably would not be the "lowest and best bidder."

II. Assuming that the statute prescribes a prerequisite, the "person or persons" designated may be divided into two classes: (1) State officers; that is, officers whose duties concern the State at large or the general public, although exercised within defined territorial limits, and (2) municipal officers, whose functions relate exclusively to local concerns of the particular municipality.

(1.) It is unquestionably true that the State can control its own officers in the exercise of their various func-

tions. Indeed, were it otherwise, there might be great danger of the officers becoming as "mice who will play when the cat's away." Fortunately, however, such is not the case. The State is their master and there is no reason why it cannot direct their actions to the same extent that a private individual may order the doings of his agent as far as they affect himself. Undoubtedly, therefore, the Legislature can make the restrictions upon these persons. As above stated, whether or not the act will have the desired effect can best be considered in a later paragraph.

(2.) As to the second class of persons—municipal officers—there is more ground for speculation. In Dillon's *Treatise on the Law of Municipal Corporations*, section 43, it is said that "the Legislature, as the trustee for the general public, has full control over the public property and the subordinate rights of municipal corporations." But that this control has a well-defined limit there can be no doubt. Grover, J., has said, in *People vs. Batchellor*, 53 N. Y., 140, "It is said that municipal corporations are creatures of the Legislature and subject to its control. In a certain sense this is true. They are created by the Legislature as instrumentalities of the government, and so far as legislation for governmental purposes is concerned are absolutely subject to its control." This is reasonable, but the statute in question is not, because a provision for the employment, when needed, of only citizens of the United States can in no sense be regarded as "legislation for governmental purposes." What legitimate governmental purpose can possibly be accomplished by restricting employes to citizens of the United States?

The private property of municipal corporations is protected by constitutional provisions the same as the pri-

vate property of the citizen, and so it seems there are certain matters, which, in a sense, may be deemed private, over which the Legislature can have no control, any more than it can control private corporations in reference to the same matters. Of these, it is submitted that the matter in question is one. In this light, the constitutionality of the Act of June 25th, 1895, so far as it concerns municipal corporations depends upon the constitutionality of an act prohibiting the employment of foreign labor by private corporations or by individuals.

Thus is raised a constitutional question beyond the narrow limits of this quiz and one which, therefore, will be passed for the purpose of considering the opinion of Cooley, J., in *Board of Park Commissioners vs. Common Council of Detroit*, 28 Mich., 228; a strong authority in support of the proposition that the Legislature has no more power to direct a municipal corporation as to whom it shall employ—whether American citizens as contradistinguished from foreigners, or Republicans as contradistinguished from Democrats, or men carnivorous as contradistinguished from vegetarians, or black-eyed typewriters as contradistinguished from blue-eyed typewriters, or men and women with any peculiarity as contradistinguished from men and women unfortunate enough to have any other peculiarity, than the Legislature has power to direct a private corporation or a private citizen as to whom it or he shall employ.

"We endeavored to show in *People vs. Hurlburt*," says Mr. Justice Cooley, "that though municipal authorities are made use of by the State in State government, and as such are under complete State control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the State at large, except in conferring the power and regu-



lating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. \* \* \* \* Municipal corporations considered as communities with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions distinct from those which they possess or can claim as conveniences in State government. If the authorities are examined, it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private, in contradiction to those in which the State is concerned, and which are called public, thus putting these corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations."

There is here a clear line of demarcation drawn between State purposes and purposes which are purely local, in which the State is no more concerned than it is in the individual concerns of its several citizens. Concerning such local public works, therefore, the Legislature has no power to control the municipal officers by such a statute as the one in question. This principle is further exemplified in *Philadelphia vs. Fox*, 64 Pa., 180, Sharswood, J., there said: "While it" (municipal corporation) "thus exists in subjection to the will of the sovereign, it enjoys the rights and is subject to the liabilities of any other corporations, public or private." One of the rights as inherent in every corporation as it is in every individual, is the right of employment. It is a "power and capacity" which may well be denominated "private." And, in respect to such private power and capacity, other things being equal, the Legislature has no greater con-

trol over a municipal than over a private corporation or an individual.

Continuing Mr. Justice Cooley's opinion in *Board vs. Council*, supra: "Whoever insists upon the right of the State to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern" (and it is here submitted that whom the municipality shall employ is as exclusively of local concern as whom an individual shall employ is exclusively of that individual's concern), "shall be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle a law which permits the rest of the community to dictate to an individual what he shall eat and what he shall drink and what he shall wear" (or whom he shall employ), "as to show any constitutional basis for one under which the people of other parts of the State, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish, a park or boulevard for the recreation and enjoyment of its citizens" (or whom it shall employ in any public improvement). "The one law would rest upon the same fallacy as the other, and the reasons for opposing and contesting it, would be the same in each case."

In considering the question of enforcement, the two contingencies must again be provided for: (1.) The statute may be considered as a mere direction; (2.) It may be construed as setting forth a prerequisite.

(1.) This is the construction briefly contended for in

the first part of this paper. As was there stated, the contractor is not in the least affected by a non-conformance with the terms of the statute. If there is any loss whatsoever resulting it results to the official making the contract. And the only loss he can sustain is removal from office, if this act may justify the same, there being no penalty provided for.

Section 4, Art. IV, of the Constitution of Pennsylvania provides that "all officers shall hold their offices on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime. Appointed officers \* \* \* \* may be removed at the pleasure of the power by which they shall have been appointed. All officers elected by the people \* \* \* \* shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."

This section has been construed in *Houseman vs. Commonwealth*, 100 Pa., 222. Mr. Justice Green there said: "Under the new Constitution there are three kinds of removal, to wit: on conviction of misbehavior or crime, at the pleasure of the appointing power, and for reasonable cause on the address of two-thirds of the Senate. All officers are subject to the first kind, appointed officers to the second and elected officers to the third. \* \* \* \* Those officers that are appointed, not some of them, but all of them, may be removed at the mere pleasure of the power that appointed them, and those that are elected, on the address of two-thirds of the Senate and by the Governor. In the latter case there must be some reasonable cause of removal, in the former there need be none but the mere will of the appointing power."

The question, therefore, is whether the failure by an

officer to observe the statute of 25 June, 1895, is a "reasonable cause of removal."

Article VI, section 3, of the Constitution provides that "the Governor and all other civil officers shall be liable to impeachment for any misdemeanor in office." The Act 1 June, 1885, P. L., 50, provides that "municipal officers shall be liable to impeachment, suspension and removal from office for any corrupt act or practice, malfeasance, mismanagement, mental incapacity or incompetency for the proper performance of official duties, extortion, receiving any gift or present from any contractor or from any person seeking or engaged in any work for, or furnishing material to, the city or from any incumbent or occupant of or candidate or applicant for, any municipal office, and for wilfully concealing any fraud committed against the city."

Malfeasance, involving a malum in se element, and incapacity seem to constitute the "reasonable causes" for impeachment or removal from office. It is difficult to place within this category a mere failure to comply with the directions set forth. In fact a compliance therewith might, as shall be endeavored to be shown later on amount to a gross "mismanagement."

(2.) The above remarks are equally applicable when treating the statute as providing a valid prerequisite. From the Commonwealth's standpoint, however, the same conclusion is not necessary, for by a failure to comply, the contract is rendered of no effect. As Marshall, C. J., said, in *Head vs. Providence Insurance Co.*, 2 Cranch., 127, "The act of incorporation to them" (the insurance company) "is an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more cre-

ates a contract than if the body had never been incorporated." At any time the Legislature can prescribe for a municipal corporation a mode of contracting, but not what particular instruments shall be used in the performance of that contract.

We come now to the second head, or

### POLITICAL.

There are two parties by which the effect of the statute, if enforced, will be felt: (1) The government of Pennsylvania in its corporate capacity, and (2) The people of Pennsylvania, in the aggregate, both citizens and foreigners.

(1.) If being a citizen of the United States makes a man, whether born in the new or old world, a better workman; if being a citizen of the United States, whether by birth or naturalization, is equivalent to being a graduate of a manual training school, then the State may be benefited by this statute. But if, on the other hand, no such result ensues from that, which, in a thousand other respects, is prolific of good results, then the State must be injured, if in no other manner, by competition being limited. A, who may do as good or better work than B, employs some laborers who are not citizens of the United States. B employs laborers who are. They both bid for the contract, A being considerably lower than B, but B must be awarded the prize, not because his price is lower, for it is higher, nor yet because his workmanship is better than A's, but simply on account of his employing only citizens of the United States.

In other words, competency and wages are the only elements which the best interests of the community require should enter into this part of a contract. A statute must be opposed to these interests which does not

only advise, but no matter what the circumstances or contingencies may be, commands the exclusion of foreigners.

(2.) Can the people of Pennsylvania be benefited by the statute? This question is best answered by calling attention to the fact that the Legislature is but "the trustee for the general public." Would such a statute benefit the cestui que trust of a private trustee? There is but one answer to this question. And yet the only difference between it and the other is one of degree. The principle upon which both answers depend is the same, and its violation should not be encouraged by the establishment of a precedent or countenanced by a statute.

Nor is it more difficult to realize what the effect of the statute will be upon foreigners. While it alone may not render their position changed to any perceptible degree, yet by it the Legislature has set an example which, if followed by the employers whom that Legislature represents, would preclude those persons unfortunate enough to have been born in a foreign country—whether industrious or not—from obtaining their daily bread. It is sincerely to be hoped that the principle here espoused by the Legislature will not find many advocates in the ranks of private individuals. And this is the more likely, as, by its espousal and execution, these natural persons would to the same extent as their artificial representative is now endeavoring to do, "bite off their own noses."

These conclusions may be briefly summed up in the statement that the "person or persons" referred to in the statute can only include those who are strictly officers of the State. That, even as to these, there is a likelihood of the statute's non-enforcement.

REGINALD HEBER INNES.

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## CONTENTS.

|                                                                                                                       | Page. |
|-----------------------------------------------------------------------------------------------------------------------|-------|
| I. Is a Contract Complete on the Posting of a Letter of Acceptance?<br>S. PRIOLEAN RAVENAL, JR.                       | 887   |
| II. Notes, . . . . .                                                                                                  | 912   |
| III. The Quiz,<br>Is the Tenant or the Landlord Liable, in Pennsylvania for Nuis-<br>ances on the Premises? . . . . . | 916   |

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**CONTRACT COMPLETE**

**ON THE**

**POSTING OF A LETTER OF ACCEPTANCE?**

**BY**

**S. PRIOLEAN RAVENAL, JR., LL. B.,**

**Member of the Philadelphia Bar.**

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**"Epistola non contrahit sed nuntiat  
dominum contrahere."**

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## TABLE OF CASES CITED.

|                                                                                  | Page.             |
|----------------------------------------------------------------------------------|-------------------|
| Adams v. Lindsell, 1 B & Ald. 681, . . . . .                                     | 9, 11, 12, 15, 21 |
| Averill v. Hedge, 12 Conn. 424, . . . . .                                        | 9                 |
| Brisbane v. Boyd, 4 Paige 17, . . . . .                                          | 17                |
| Byrne v. Van Tienhoven, L. R. 5 C. P. D. 344, . . . . .                          | 10                |
| Cote, ex parte, L. R. 9 Ch. App. 27, . . . . .                                   | 21                |
| Cowan v. O'Connor, L. R. 20 Q. B. D. 40, . . . . .                               | 14                |
| Dickinson v. Dodds, L. R. 2 Ch. D. 472, . . . . .                                | 7, 13             |
| Dunlop v. Higgins, 1 H. L. C. 881, . . . . .                                     | 8, 16, 20         |
| Dunmore v. Alexander, 9 S. & D. 190, . . . . .                                   | 13                |
| Fitch v. Snedaker, 38 N. Y. 248, . . . . .                                       | 7                 |
| Great Northern R. R. Co. v. Nitbam L. R. 9 C. P. 16, . . . . .                   | 10                |
| Hamilton v. Insurance Co., 5 Barr 339, . . . . .                                 | 10, 11            |
| Harris' Case, L. R. 7 Ch. 587, . . . . .                                         | 17                |
| Henthorn v. Fraser, L. R. (1892) 2 Ch. D. 27, . . . . .                          | 17, 18, 19        |
| Household Insurance Co. v. Grant, L. R. 4 Ex. D. 216, . . . . .                  | 19, 20            |
| Luke v. Lyde, 2 Burr 887, . . . . .                                              | 22                |
| McCulloch v. Eagle Insurance Co. 1 Pick. 278, . . . . .                          | 9                 |
| Potter v. Sanders, 6 Hare 1, . . . . .                                           | 13                |
| Quick v. Wheeler, 78 N. Y. 300, . . . . .                                        | 10                |
| S— v. F—, Repert. de Juris. tit. Vente, Sect. 1, Art. III, No. XI bis, . . . . . | 8                 |
| Stevenson v. MacLean, L. R. 3 Q. B. D. 346, . . . . .                            | 10                |
| Swift v. Tyson, 16 Peters 19, . . . . .                                          | 22                |
| Tayloe v. Merchants' Insurance Co. 9 Howard 390, . . . . .                       | 16                |
| Thompson v. James, 18 Dunlop 1, . . . . .                                        | 17                |
| Weiden v. Woodruff, 38 Mich. 130, . . . . .                                      | 10                |



## *Is a Contract Complete on the Posting of a Letter of Acceptance?*

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Apart from authority, one might hesitate whether a contract should be regarded as the embodiment of certain empirical rules or as an abstract conception. The Courts have chosen the latter course. They have, however, always looked first to the requirements of substantial justice, and have refrained from impeding the proper progress of business transactions for the sake of carrying out a mere theory. Clearly necessary as are these adaptations to practical expediency, the Courts have, unfortunately, often failed to recognize such adaptations as departures, but have endeavored to form a theory which would include the cases before them, and which would be subject to no exceptions.

The conception of a contract is a meeting of minds. The minds are conceived of as coming together like material bodies, and their meeting occurs at a definite time and place. This is the view of the Common, as well as of the Civil, Law (1). Yet every meeting of minds does not form a contract. A familiar instance is the verdict of a jury. There, twelve men agree to the same thing, but there is no contract. To constitute a contract, the agreement must be to do something or to forbear to do something; the something agreed to be done or

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(1.) It is sometimes said that it is the consideration which gives rise to the obligation at the Common Law: (Hare on Contracts, 170). I think consideration should rather be classed as one of the requisites of a contract which the law will enforce.

agreed not to be done must be something which the law does not consider contrary to public policy; the parties must be such as the law deems competent; the contract must be made in such form as complies with the requirement imposed by law. Presuming the object, the parties, and the form, such as the law will recognize, what are the essentials of a contract?

Contracts were first made by parties in the presence of each other. The requirements of such contracts became fixed, and were recognized as the basis of the theory of contracts. This general theory was, afterwards, supposed to include not only all contracts made when the parties were in the presence of each other, but also contracts made when the parties were at a distance from each other. As to what is necessary to the formation of contracts made *inter presentes*, the authorities are at one. But as to the theory which underlies their formation, and which is supposed to regulate contracts made *inter absentes*, there is still some doubt. For, the practical necessities of parties contracting with each other at a distance, dictate certain modifications of the ordinary requirements when parties are contracting in the presence of each other.

When a person standing in the presence of another makes an offer, it becomes immediately known to the other. If the offeree accept it, his acceptance is known to the offeror the moment it is made. The contract is then complete, irrevocable and binding on both parties. Here we have two parties agreeing to the same thing and each conscious of the other's assent. This is the typical contract. So in contracts *inter absentes*, we should, by analogy, expect that both the offer and acceptance must be communicated before the contract would



be complete. This is the view at the Civil Law, and was originally at the Common Law (1).

The case of *Fitch vs. Snedaker* (2) decides that an offer must be communicated, to be an offer. It is there laid down that a reward cannot be claimed by one who did not know that it had been offered. This decision, says Sir William Anson, seems undoubtedly correct in principle. One who does an act for which a reward has been offered, in ignorance of the offer, cannot say that there was a consensus of wills between him and the offeror (3). So, too, according to principle, the acceptance by the offeree must be communicated to the offeror before the contract is complete. Up to that time it is not binding on either. Therefore, if the offeror die, or become insane, or change his mind before knowledge of the acceptance, there is no contract. "It appears to me," says Lord Justice James (4), "that there is neither principle or authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not a continuing offer, then the acceptance comes to nothing" (5). Likewise, if the acceptor change his mind, and make his change of

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(1.) Hare on Contracts, p. 347.

(2.) 38 N. Y. 248.

(3.) Anson's Law of Contract, p. 16.

(4.) In the case of *Dickinson v. Dodds*, L. R. 2 Chan. Div., at p. 472.

(5.) He continues, "Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed." This modification has been introduced to facilitate the making of contracts between parties at a distance from each other. When a party makes an offer by letter, he is presumed to be of the same state of mind until word has reached the other party of some change. See below page.

mind known to the offeror before the offeror knows of his acceptance, there is no contract. "A letter," says Trolong, "performs the office of spoken words; and just as a word produces no effect until it strikes the ear of the person addressed, so a letter is a real and complete instrument of communication of thought only when it is read by the correspondent. I can revoke the promise made in a letter written and sent but not yet read by him to whom it is addressed, just as I am not bound by words spoken but not heard by the person with whom I am treating verbally" (1). "*Epistola antequam pervenit ad eum cui est directa, nulla oritur obligatio mittentis seu scribentis*" (2). Lord Fullerton says: "I do not see how there can be in idem placitum concursus et conventio between two parties, where one of them remains in entire ignorance of the fact—the acceptance—on which the concursus et conventio is supposed to rest" (3). Merlin says, after a review of the ancient authorities, "The letter by which I contract an obligation can therefore only fulfill its objects so far as I can be supposed to persist, at the moment when it arrives, in the will which I had in writing it. If, therefore, at the moment when my letter arrives I have already in another way manifested and notified a contrary will, my letter can no longer bind me; it is paralyzed in advance" (4). Toullier supposes this case: A letter containing an offer is sent January 1; an acceptance is posted January 5, which arrives January 8. Meanwhile, on January 7, a revocation was posted. The acceptance being still unknown, is the re-

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(1). *Droit Civil Explique De la Vente*, tome 1, chap. 1, Nos. 22-25.

(2). Ansaldu, de *Commercia et Mercatura*, disc. 61, No. 2.

(3). *Dunlop v. Higgins*, 1 H. L. C., 381.

(4). *S— v. F— et al*, *Repertoire de Jurisprudence*, Tit *Vente*, Sect. 1, Art. III., No. XI., bis.

vocation valid? "Elle l'est sans doute dans la rigueur des principes" (1). The conclusion of Toullier is inevitable: there is no contract according to principle. In *Adams vs. Lindsell* (2) the decision that the acceptance closed the contract rested on considerations of supposed convenience and necessity, and was a departure from the fundamental principles of contract. But, guided solely by the underlying theory of contracts, it is hard to see how a court could decide that there was a contract before notice of acceptance to the offeror. *M'Culloch vs. Eagle Insurance Co.* (3) was a case decided by the Supreme Court of Massachusetts four years after *Adams vs. Lindsell*, but in apparent ignorance of it. There, Chief Justice Parker disregarded considerations of convenience and necessity, and was forced to decide that "the offer did not bind the plaintiff until it was accepted, and it could not be accepted to the knowledge of the defendants until the letter announcing the acceptance was received." This decision does not seem to have been questioned in Massachusetts, and so remains law in that Commonwealth. In *Averill vs. Hedge* (4) the court went out of its way to approve the doctrine of *McCulloch vs. Eagle Insurance Co.* These authorities proceed on what is, I think, the pure theory of contracts—the principles derived from contracts made *inter presentes*.

Though it is strictly theoretical to hold neither offeror nor acceptor bound by a contract until after notice of acceptance, yet it is an untenable position, in view of the decisions in England as well as those of the United States Courts and

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(1). Toullier *De Droit Civil Francais*.

(2). 1 B. & Ald., 681.

(3). 1 Pick, 278.

(4). 12 Conn., 424.

of most of the States. It is also incompatible with practical expediency. There must be some departure from the simple and pure theory. Say it takes a week for a letter from Liverpool to reach New York. Suppose a merchant in Liverpool makes an offer to a merchant in New York, which is accepted by return mail. The merchant in New York, before he can consider the contract as binding, must wait, not only up to the time of the receipt of his letter, but even until he hears of the completion of the contract. For, at any time up to the receipt of the New York merchant's letter, the Liverpool merchant could withdraw the offer. So that the former cannot be sure that the contract is in force until he knows that his letter was received before any withdrawal was sent. The courts have said very wisely that this delay was inconvenient and unnecessary, and have decided that an offeror is not at liberty to withdraw his offer unless the revocation arrived before the offer had been accepted. This is now the law in England and generally in the United States (1). Many doctors of the Civil Law have wished to avoid this delay in acting upon a contract, and have argued that the offeror is liable in damages if he retract after acceptance (2). The Italian Commercial Code, in force since January 1, 1883, has the following provision (3): "Both proposal and acceptance are revocable before the conclusion of the contract. But if the acceptor has begun to act on the proposal before receiving notice of its revocation, the proposer is liable

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(1). *Great Northern Railway Company v. Nibham*, L. R. 9, C. P. 16; *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344; *Stevenson v. MacLean*, L. R. 3 Q. B. D., 346; *Weiden v. Woodruff*, 38 Mich., 130; *Hamilton v. Ina Co.* 5 Barr, 339; *Quick v. Wheeler*, 78 N. Y. 300.

(2). Pothier, *Traite du Contract de Vente*, 1, 2, 3; 32 *Toullier* Vol. VI. III., 3; 39 *Warnkvenig*, p. 59.

(3). Art. 36.

to him for resulting damage." According to the Prussian Commercial Code, an offeror is bound by his offer if the offeree accept it within a reasonable time (1). The Swiss Federal Code of Obligations has the same provision (2). In *Adams vs. Lindsell* the court went to the extreme of saying that a contract could never be completed by post unless the offeror was bound at the time of acceptance. "For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so on ad infinitum" (3). But this reasoning is obviously fallacious, for there was no possibility of keeping the contract open after the time the notice of acceptance was received. The court continues: "The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs." Applying the same reasoning to a letter of acceptance, one would say the acceptor must be considered in law as remaining of the same state of mind during every instant of time his letter was traveling, and when this state of mind is known to the offeror, the contract is complete. It is true that both parties cannot know of the completion of the contract as soon as it is made. But this is impossible in any case. Either the contract is complete when the offer is accepted, in which case the offeror is in ignorance, or

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(1). Art. 319.

(2). "Lorsque l'offre a été faite sans fixations de délai à une personne non présente, l'auteur de l'offre reste lié jusqu'au moment où il peut s'attendre à l'arrivée d'une réponse qui serait expé liée à temps et régulièrement." Art. 5.

(3). 1 B. & Ald., at p. 683. These words have been quoted and adopted by the Supreme Court of Pennsylvania in *Hamilton v. Ins. Co.*, 5 Pa., 339.

else it is complete when the letter of acceptance is received, in which case the acceptor is in ignorance. But, on either supposition, the formation of the contract would be governed by definite rules, and the period of its formation limited to a definite time. The learned judge, in the case of *Adams vs. Lindsell*, went still further and said that the contract was complete as soon as the acceptance is posted. But this deprives the acceptor of his rights to anticipate his acceptance by a refusal. I can see no advantage to be gained by so holding. In support, however, of this decision, it is urged that there cannot be a contract binding only on one party, that both are free until the *punctum temporis* from which both are bound, and that if the offeror is to be bound from the time at which the letter of acceptance is posted, the acceptor must also be bound from the same moment. It is undoubtedly true that in theory there must be such a *punctum temporis*. But we found this *punctum temporis* to be the moment that the acceptance comes to the knowledge of the acceptor. We also found that to carry out the strict theory in contracts made by correspondence, great inconvenience would result, and that some departure is necessary. It seems to me that it is less of a departure to hold the offeror bound before the contract is complete than to say that both parties shall be bound from a time before which the contract is, in theory, complete. And to take away the acceptor's right to countermand his acceptance by a swifter message is not only departing further from the fundamental theory, but working a great injustice. Although the dictum in the case of *Adams vs. Lindsell* certainly deprives the acceptor of this right of revocation, yet I venture to think that the court was not contemplating such a conse-

quence. All that was intended by the decision was that the contract was complete as against the offeror, from the time the letter of acceptance was posted. The right of the acceptor to revoke his acceptance, provided his revocation arrives before his acceptance, is admitted by the Codes of Germany (1), Switzerland (2), Italy (3), and the Indian Contract Act (4). In Scotland (5) and in France (6) the law is the same.

A misapprehension that has been very potent in leading to wrong views of the theory of contracts, is the confusion between the time from which a contract dates and the time at which it becomes complete. With regard to the former, there have been three opinions: first, that the contract dates from the time and place at which the offer was made (7); second, that the contract dates from the time when and place where the offeror receives the letter of acceptance (8); and third, that the contract dates from the time and place from which the acceptance is sent (9). The last is the best opinion. But it has been thought that because a contract dates from the despatch of the letter of acceptance, that it must be complete on acceptance. Thus Casaregis says that if a merchant of Genoa writes to his correspondent in Venice

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(1). "In like manner the acceptance is deemed null and void if the revocation has been communicated to the proposer before the acceptance or at the same time with it." German Commercial Code, Art. 320.

(2). "De même, l'acceptance est considérée comme non avenue, si le retrait en parvient à l'auteur de l'offre avant l'acceptation ou en même temps." Swiss Federal Code of Obligations, Art. 7.

(3). See above, p. 10.

(4). I. U. A., C. 1, Sect. 4.

(5). *Dunmore v. Alexander*, 9 S. & D. 190.

(6). See above, p. 4, note 2.

(7). *Dickinson v. Dodds* L. R. 2 Ch. Div., 463; *Potter v. Sanders*, per *Negram*, V. C., 6 Hare, 1, 8.

(8). *Infra*.

(9). *Infra*.

proposing a bargain, and the Venetian accept, it is in Venice and not in Genoa that the contract is considered as made; and consequently he argues that the contract is complete on acceptance (1). So also Sir William R. Anson cites the case of *Cowan vs. O'Connor* (2), which decided that the cause of action arose at the place whence the acceptance proceeded, in proof of the position that a contract is complete on the despatch of acceptance (3). On the other hand, Rocco, falling into the same fallacy of thinking that the time from which a contract dates, must be the same at which it becomes complete, but holding the opinion that a contract was not complete until notice of acceptance, said that if a Neapolitan write a letter to a Londoner proposing a bargain, and the latter reply by letter accepting, it would be in Naples and not in London that the contract would be formed, because it would be in Naples that the acceptance first came to the knowledge of the offeror. Nevertheless, the two facts are entirely distinct, the contract may be made at one time and date from another. Take the case of a contract made by an agent who has not power to bind his principal, unless the principal ratify the contract. Now, if the contract is ratified, it dates back to the time when it was made by the agent, and not from the time of ratification. It cannot be inferred, therefore, that it was complete from its date, for it was not valid until ratified. Prof. Langdell (4) gives two further illustrations: "So in the case of the enrollment of a deed of bargain and sale, but for the statute of enrollment the deed would be complete and operative without any such ceremony,

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(1). *Casaregis*, Disc. 179, N. 1 et seq.

(2). L. R. 20 Q. B. D., 640.

(3). *Anson on Contract*, p. 24, note 1, Ed., 1891.

(4). *Langell on Contracts*, 15.



the statute interferes and makes the deed a nullity unless enrolled, but when enrolled, it is the deed and not the enrollment that conveys the land. The enrollment, act, it is the parol agreement that makes the contract, therefore, must of necessity relate back. So in the case of a parol contract rendered invalid by the Statute of Frauds, where the Statute is afterwards complied with by a memorandum in writing, or some other sufficient and therefore the making of the contract must be referred to the time when the parol agreement was made."

Let us examine some of the leading decisions in England and in this country. Of all the cases in which it has been held that the acceptor, as well as the offeror, has no right to retract after the posting of the letter of acceptance, I do not see that on the facts of any, was such a decision warranted. The case which first enunciated the doctrine that a contract is complete on the posting of the acceptance, and the one usually cited in support of that position, is *Adams vs. Lindsell* (1). The facts were as follows: The defendants offered to sell to plaintiffs certain goods, "receiving an answer in course of post." The letter was misdirected, and therefore was received by plaintiffs two days late. The plaintiffs closed with the offer immediately. The day after their answer should have been received, had there been no misdirection of the letter containing the offer, the defendants sold the goods. The plaintiffs thereupon sued the defendants for breach of contract. At the trial the judge virtually gave binding instructions to the jury. A rule nisi was thereupon obtained for a new trial. The court decided that the offer was accepted in due time, and that the offeror could not hold the acceptor liable for the of-

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(1). 1 B. & Ald., 681.

feror's laches. I can see no other possible question in that case. The discussion as to when a contract is completed, into which the court entered, is in its nature nothing more than obiter dicta. The question of whether the contract was complete on the posting of the letter or on its receipt, could not have arisen, because neither party attempted to retract until after the letter had been received. The question was not, When was the contract made, but was it made at all? So in the case of *Dunlop vs. Higgins* (1), the case turned on whether or not the acceptance reached the offeror within a reasonable time. The court decided that it did, and as there was no attempt at revocation, Lord Cottenham's opinion can have only the weight of a dictum. The decision in *Tayloe vs. Merchants Fire Insurance Co.* (2) claims our consideration, coming as it does from the Supreme Court of the United States. There, an insurance company offered to insure a house on certain terms, the house owner accepted the company's offer and posted the letter enclosing his check. While this letter was traveling, the house burned down, and the company refused to pay. This is simply a case of an offeror trying to escape from a contract, which, we have shown, can not be done after acceptance. Why go to the length of holding the acceptor also bound? He, surely, was not trying to withdraw. Had he sent a revocation, which reached the insurance company before his acceptance, the question would then have been raised. I do not think that Mr. Justice Nelson was contemplating all cases which his words cover. He had in mind only cases like the one before him, where an offeror tries to revoke his offer after it has been accepted.

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(1). 1 H. L. C., 381.

(2). 9 Howard, 390.

He says, "We are of opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended and is to be deemed a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail accepting them; and it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted." I understand the rest of his decision to be intended merely as supporting that proposition. Furthermore the offer contained these words: "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." Is this not enough to bring the case under that class of contracts where an act is authorized to take the place of the communication of acceptance? There are a number of cases, like *Taylor vs. Merchants' Fire Insurance Co.*, in which it was only necessary to decide that a contract is binding on an offeror, after posting of acceptance, but in which the judges have laid down the law too broadly, and said that the contract was completed and so binding on all parties. In this class are, *Harris' case* (1), *Thompson vs. James* (2), *Brisbane vs. Boyd et. al.* (3) and *Henthorn vs. Fraser* (4).

We next come to a class of cases founded on what, I venture to think, an erroneous principle—that a letter of acceptance in answer to an offer by letter is sent at the risk of the offeror. This rule originated in England, where letters are seldom lost. It saves the acceptor the delay and trouble of finding out whether his letter was

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(1). L. R., 7 Ch., 587.

(2). 18 Dunlop, 1.

(3). 4 Paige, 17.

(4). L. R., 1892, 2 Chan. Div., 27.

received. But this principle is certainly not in accord with the laws of other correspondence, as Lord Bramwell pointed out in the case of the Household Insurance Co. vs. Grant (1). "Suppose a man has paid his tailor by cheque or bank note, and posts a letter containing a cheque or bank note, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending cheques and bank notes to his banker by post, and posts a letter containing cheques and bank notes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it?" Driven to the logical conclusion of the supposition that "an offer by post invites an answer by post, and that an acceptance in the mode indicated by the offeror concludes the contract," Lord Justice Thesiger and Lord Justice Baggallay, Lord Justice Bramwell dissenting, decided that the posting of a letter of acceptance, though it never reached the offeror, bound him to a contract, of the existence of which he was in ignorance. In support of this view, it has been argued that the postoffice is the common agent of both parties, and consequently when an acceptance is posted, it is communicated to the offeror (2). But this argument has been answered in the recent case of Henthorn vs. Fraser. "The postoffice are only carriers between them. They are agents to convey the

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(1). Household Ins. Co. v. Grant, L. R. 4 Ex. Div., 316.

(2). Per Thesiger, L. J., Household Fire Insurance Co. v. Grant, 4 Ex D., 216.

communication, not to receive it. The communication is not made to the postoffice, but by their agency as carriers. The difference is between saying, "Tell my agent A., if you accept," and "Send your answer to me by A." In the former case A. is to be the intelligent recipient of the acceptance, in the latter he is only to convey the communication to the person making the offer which he may do by a letter, knowing nothing of its contents. The postoffice are only agents in the latter sense" (1). But to say that the postoffice is the agent to receive the acceptance, is only another way of putting the idea that an offer by post authorizes an acceptance by post. This view has been disapproved in England in the same case of *Henthorn vs. Fraser*, and the present law stated by Lord Herschell: "It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the postoffice no less than any other. The only effect of the supposed authority is to make the acceptance complete as soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted" (2). Too much is decided, when, in order to

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(1). L. R., (1892) 2 Chan Div., at p. 33.

(2). L. R. (1892), 2 Chan. Div., at p. 33.

establish the fact that an acceptor is not responsible for the delivery of his letter of acceptance, it is held that the contract is complete, from which it must follow that the acceptor is without right to anticipate his message by one swifter. "It was said, if he sends it by hand, it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding. It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before it arrived he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed" (1).

The review of the decisions we have just completed reveals no case, the judgment in which does not conform to what we have found to be the true theory of contracts (2), but there are many dicta which enunciate a different theory. We have seen that in England it is held that the posting of a letter of acceptance completes the contract. The reason in the minds of the judges who first enunciated the doctrine, seems to have been that the acceptor had done all that he could do by posting his letter, and that then he had no further control over it (3). This presupposes two things: first, that the post is the quickest means of communication, and, second, that a letter

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(1). Per Lord Bramwell, *Insur. Co. v. Grant*, 4 Ex. Div. of p. 235.

(2). The cases in the class with the *Ins. Co. v. Grant*, conform, if we assume that a letter posted is the same as a letter delivered.

(3). 1 H. L. C., 381.

once posted cannot be withdrawn. In regard to the first point, the post was the quickest ordinary means of communication at the time when the cases were decided in which the doctrine originated. *Adams vs. Lindsell* was decided in 1818, fifteen years before the telegraph was first tried as an experiment. In regard to the second point, it is true that in England a letter once posted cannot be withdrawn, but it is otherwise in the United States at the present time. Lord Justice Mellish, in the case of *Ex parte Cote* (1) says, "But according to the regulations of the French postoffice, a person who posts a letter may get it back on complying with certain forms at any time before the letter has left the town where it is posted. I am inclined to think that the effect of that rule is that the postoffice is the agent of the sender of the letter until it leaves the town." And per the Chancellor, Lord Selborne, "According to the regulations of the French postoffice, the sender of a letter has a *locus poenitentiae*, and has the power of reclaiming it after it is posted." In the United States, this *locus poenitentiae* extends up to the time the letter is actually delivered. For, not only can a letter be withdrawn from the office in which it is posted, but even if it has left that office and reached its destination "the delivery of the same may be prevented and its return to the writer secured by an application by the writer to the postmaster at the office of mailing \* \* \* the postmaster shall telegraph a request for the return of such letter to his office, if it has been forwarded, to the postmaster at the office of address" (2). We see therefore that the authority of the decided cases is very slight. The requirements of business on

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(1). L. R. 9 Chan. App. Cases, 27.

(2). U. S. Official Postal Guide, p. 805, under authority of the act of March, 1886.

which they were based are not the same as those now existing. The law of contracts is comparatively a new branch of English jurisprudence, and what we have is taken largely from the Civil Law (1). The English law on this subject neither possesses the antiquity nor the distinctiveness which characterize the law of real property or our principles of government. Though the principles of contract must be frequently extended and modified to meet the needs of the most complex relations occasioned by the progress of civilization, yet the fundamental principles should be abiding and universal. The true ideal is voiced by Cicero and re-echoed by Mansfield (2) and Story (3), "*Non erit alia lex. Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtenbit.*"

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(1). Lord Mansfield and the fathers of our contractual law, were great Civilians, and when new cases came before them, they decided them according to the well considered principles of the Civil Law.

(2). *Luke v. Lyde*, 2 Burr. at p. 887.

(3). *Swift v. Tyson*, 16 Peters, at p. 19.



# INDEX.

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## A.

|                                                          | Page.            |
|----------------------------------------------------------|------------------|
| Acceptance, closes the contract, .....                   | 9                |
| if not communicated until after refusal not binding, ... | 8                |
| implied, authority to send by post, .....                | 19               |
| must be communicated, .....                              | 7                |
| sent at risk of offeror, .....                           | 18               |
| when binding on offeror, .....                           | 17               |
| when not binding on acceptor, .....                      | 17               |
| Acceptor, right to revoke before acceptance, .....       | 13               |
| Adams v. Linsell (1818), .....                           | 9,11,12,15,16,21 |
| Authority, implied to send acceptance by post, .....     | 19               |

## B.

|                                                               |    |
|---------------------------------------------------------------|----|
| Business, how its requirements affect Adams v. Linsell, ..... | 21 |
|---------------------------------------------------------------|----|

## C.

|                                                                                         |       |
|-----------------------------------------------------------------------------------------|-------|
| Code, Italian commercial, on proposal and acceptance, .....                             | 10    |
| Contract, completion distinct from date, .....                                          | 13,14 |
| conception of—meeting of minds, .....                                                   | 5     |
| date of distinct from completion, .....                                                 | 13,14 |
| date of—three opinions as to rule, .....                                                | 13    |
| elements of, .....                                                                      | 5,6   |
| extension of principles, .....                                                          | 23    |
| formation of—when inter praesentes, .....                                               | 6     |
| formation of—when inter absentes, .....                                                 | 6     |
| newness of law of, .....                                                                | 22    |
| two minds must be at one to constitute, .....                                           | 7     |
| typical—where parties are both present, .....                                           | 6     |
| Convenience regarded in rule that contract is complete when acceptance is posted, ..... | 9     |

## D.

|                                                                         |       |
|-------------------------------------------------------------------------|-------|
| Date of contract distinct from completion, .....                        | 13,14 |
| three different opinions as to rule, .....                              | 13    |
| Departure from pure theoretical view demanded by practical cases, ..... | 10,12 |
| Development of law of contracts, .....                                  | 22    |

## I.

|                                                                          | Page. |
|--------------------------------------------------------------------------|-------|
| Improvements of law as affecting rule of <i>Adams v. Linsell</i> , ..... | 21    |
| Inter absentes—when contract complete—in civil law, .....                | 6,7   |
| Inter praesentes contracts so made, basis of theory, .....               | 6     |
| Italian Commercial code on proposal and acceptance, .....                | 10    |

## L.

|                                              |    |
|----------------------------------------------|----|
| Letters no affect until read, .....          | 8  |
| of acceptance sent at risk of offeror, ..... | 18 |
| Locus poenitentiae, .....                    | 21 |

## M.

|                                                                   |     |
|-------------------------------------------------------------------|-----|
| Massachusetts, when letter contract there complete, .....         | 9   |
| Meeting of minds, when not a contract, .....                      | 5,6 |
| Modern views as affecting rule of <i>Adams v. Linsell</i> , ..... | 21  |

## O.

|                                                                     |    |
|---------------------------------------------------------------------|----|
| Offer can not be withdrawn unless revocation arrives before accept- |    |
| ance, .....                                                         | 10 |
| must be communicated, .....                                         | 7  |
| continuing until time of acceptance, .....                          | 7  |

## P.

|                                                                  |    |
|------------------------------------------------------------------|----|
| Postoffice, former view that, was common agent of parties, ..... | 18 |
| latter modification of this, .....                               | 19 |
| regulations as to withdrawal of letters in France and            |    |
| United States, .....                                             | 21 |
| Posting of letter of acceptance completes contract, .....        | 15 |
| Proposal and acceptance, English and American doctrine of, ..... | 10 |
| Italian Commercial Code, .....                                   | 11 |
| Prussian Commercial Code, .....                                  | 11 |
| Swiss, .....                                                     | 11 |
| Punctum temporis, .....                                          | 12 |

## R.

|                                                                      |     |
|----------------------------------------------------------------------|-----|
| Refusal to accept, if communicated before acceptance, destroys the   |     |
| contract, .....                                                      | 7,8 |
| Regulations of postoffice as to withdrawal of letters in United      |     |
| States and France, .....                                             | 21  |
| Requirements of business, how affect <i>Adams v. Linsell</i> , ..... | 21  |
| Revocation of acceptance communicated first to the offeror destroys  |     |
| contract, .....                                                      | 20  |

## S.

|                                                                      |   |
|----------------------------------------------------------------------|---|
| Substantial justice considered when applying theory of contracts,... | 5 |
|----------------------------------------------------------------------|---|

INDEX.

25

|                                                                                          | Page. |
|------------------------------------------------------------------------------------------|-------|
| Spoken words, when similar in affect to a letter, .....                                  | 8     |
| T.                                                                                       |       |
| Telegraph, its affect on dicta of Adams v. Linsell, .....                                | 21    |
| V.                                                                                       |       |
| Verdict of jury no contract, yet a meeting of the minds, .....                           | 5     |
| W.                                                                                       |       |
| Withdrawal of letters from post—doctrines of England, France and<br>United States, ..... | 21    |



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## NOTES.

The resignation of Professor C. Stuart Patterson as Dean of the Law School is in the hands of the trustees of the University of Pennsylvania. This action on the part of Professor Patterson has been necessitated by conflicting demands upon his time in his professional and business duties, which prevent him from devoting himself as fully to the administration of the Law School as he feels that the important responsibilities of the position deserve. By his retirement from control, after the faithful service that has characterized his official connection with the school, the University loses an able administrator whose position will not be easily filled. Professor Patterson has been associated with the Law Department as its official head for seven years, and during that time the growth of the Department has been unprecedented in its history. Seven years ago the number of students enrolled aggre-

gated but one hundred and twenty-nine; while those in attendance during the last scholastic year reached the number of two hundred and eighty-one. At the beginning of his administration there were but four professors or instructors in the faculty; but the teaching force has been increased in proportion to the increase in attendance until now it numbers twelve. Professor Patterson will continue his relation to the Law School as professor of Constitutional Law, in which capacity as well as professor of Real Property, he has served since 1887.

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The history of the Supreme Court of Pennsylvania in late years has unmistakably demonstrated the necessity of some mode of relief from the increasing number of cases that have annually burdened its argument list. The judges have been confronted with the alternative of continually increasing their exertions to expedite the disposal of the questions submitted to them for investigation and final adjudication, or else submitting themselves and litigants to the inconvenience of delayed judgments on account of an encumbered docket. Despite their best efforts they have found it impossible to meet the growing demands upon the court, and at the same time devote to the interests submitted to them the time and thought which their importance demanded. The result has been that the court has been overworked, and it has not been allowed opportunity for such mature and united deliberation as should attend authoritative utterances upon the complex questions upon which it has been called to pass. In announcing the death of Justice Silas M. Clark to the court on January 4th, 1892, Chief Justice Paxson, after remarking the fact that Justice Clark was the fifth member of the court who had died in

commission during his service on the bench, said: "Our labors are now so exacting that nothing short of a constitution of iron will carry a man through a term of twenty-one years." To obviate this condition of things and relieve the court from overwork, the new Superior Court has been created by the Legislature. Intervening between the lower and the Supreme Court, and assuming the burden of the minor cases, it is intended to afford the highest tribunal some respite from over-exacting duties, and to enable it to bring more exhaustive research to the determination of the more important cases which remain for its adjudication.

Of the constitution of the new court, we do not desire, at present, to speak.

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The exodus of the courts from the old buildings on Independence Square makes accessible to the Law School a place for conducting its work during the coming year which is more fitted to met the growing demands of an increasing attendance than were the quarters hitherto occupied. Rooms vacated by the courts have been engaged for the accommodation of the library and for use as lecture rooms. Of these, the new court house on Sixth street (formerly occupied by Court of Common Pleas No. 1) will be used as a library and faculty rooms; and besides offering commodious advantages for shelving the books, they will afford enlarged accommodations for study over the old library. The lectures will be conducted in rooms G and H, of the Court of Common Pleas No. 4, and will be disassociated from the library. The work of removal will be complete before October 1st, and the work of the year will begin in the new quarters.





# THE QUIZ.

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It is the general purpose of this department of the Pennsylvania Law Series to direct attention briefly to such changes as from time to time shall occur in the body of the law, either through new or different applications of the principles of the common law or by means of statutory enactments.

It is intended to accomplish this, by means of a carefully prepared system of questions and answers; the questions, where practicable, being obtained from some leading specialist in that branch of the law in which the change occurs and the answers presenting the reason, as well as the substance of the change.

*Is the Tenant or the Landlord Liable, in Pennsylvania, for Nuisance on the Premises?*

SYNOPSIS.

PART I.

|                                                                                  |    |
|----------------------------------------------------------------------------------|----|
| When nuisance created before the demise, . . .                                   | 3  |
| Chapter I. When landlord in possession before a demise, . . . . .                | 3  |
| Chapter II. When tenant continues the nuisance, .                                | 8  |
| Sec. 1. When created before original demise, ' . . . . .                         | 8  |
| Sec. 2. When created after original demise, though before renewal, .             | 13 |
| Chapter III. When created before the demise, though becoming active after, . . . | 20 |
| Sec. 1. When arising from nature of erection, . . . . .                          | 20 |
| Sec. 2. When arising from physical insufficiency of the erection, . .            | 26 |

PART II.

|                                                                                     |    |
|-------------------------------------------------------------------------------------|----|
| When nuisance created after the demise, . . . .                                     | 28 |
| Chapter I. When landlord covenants to repair, .                                     | 28 |
| Sec. 1. The Common Law liability of the occupant, . . . . .                         | 28 |
| Sec. 2. When nuisance arises from part that landlord covenants to repair, . . . . . | 29 |
| Sec. 3. When landlord covenants to make specific repairs, . . . . .                 | 32 |
| Chapter II. When result of negligence of tenant, .                                  | 34 |
| Chapter III. When result of a use not contemplated by landlord, . . . . .           | 38 |
| Chapter IV. When landlord in possession, . . . .                                    | 4  |
| Sec. 1. When he resumes temporary possession, . . . . .                             | 42 |
| Sec. 2. When he continues in possession after a demise, . . . . .                   | 43 |

## PART I.

### When Nuisance Created Before the Demise.

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#### CHAPTER I.

#### When Landlord in Possession Before a Demise.

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When the landlord or owner is in possession, either actual or constructive, before the granting by him of a lease, his possession fixes his liability to see that no injury results to a stranger by reason, either of the nature of the premises or of their condition for the want of repair. The case of *Grier vs. Sampson* (1) was an action on the case by David Sampson against David A. Grier to recover damages for personal injuries sustained by him in consequence of being thrown into an open vault, alleged to be on premises owned by the defendant. The property was situated on the south side of a road, and contained 120 feet in front. Several houses had been erected on this lot, the front walls meeting the line of the street. In front of the houses and extending 8 feet into the road, were vaults communicating with the basement of the buildings. This was covered over with planks. In 1849, the title to this property was vested in a man by the name of Smith, and was levied and sold as his property by the sheriff to the defendant Grier. After the sheriff's sale, the defendant alleged that Smith and

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(1). 27 Pa. 183.

his tenants remained under a parol agreement, and that a reconveyance was to be made of the property as soon as Smith would refund to Grier the amount of the purchase money and the amount of Grier's debt against Smith. Under this agreement Smith remained until 1853, when the tenements upon the lots were consumed by fire. The fire had consumed the plank which covered the vault in the street or road, and it remained open. Grier resided in Allegheny City, and the premises remained vacant from the time of the fire until 14th March, 1854, when the plaintiff, returning from market in a buggy, met a coal team loaded, at which his horse, taking fright, leaped into the vault, dragging the buggy in which the plaintiff was.

The defendant relied upon the parol agreement, and the continued possession in pursuance of it; but, especially, as Smith did not hold an uninterrupted possession, the court held that the agreement was not sufficient. This being so, and there having been no other occupant from the time of the fire, the owner was of course in constructive possession at the time of the accident. The court supposing a case of actual possession by the owner, or a case of constructive possession without any tenant in actual possession, laid it down as a rule of law—"That the owner of real estate lying along a public street or highway is bound to keep it in such repair as to make it safe to passers by, and is liable in damages for injury resulting from his neglect to perform this duty, is a proposition unquestioned by the thirteen errors assigned upon this record."

The case of *Brown vs. Weaver* (1) is an illustration of

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(1). 17 W. N. C. 200.

the case where the owner comes into possession of premises held, at the time of the grant to him, by tenants under a lease from his grantor. The defendant owned a large factory building at the southwest corner of Twelfth and Buttonwood streets, Philadelphia, having purchased the same upon November 7th, 1883, less than a month before the accident. At that time the building was occupied by several tenants, who held under the former owner. In one corner of the building was an area, serving for the supply of light and air, an entrance to the basement over the end of this area was a flight of wooden steps leading up to the first floor. There was no other guard. The edge of the area had been broken away, so that the area extended beyond the foot of the stairs. Two planks were then placed over the area way to prevent further damage. This took place before November 7th, when the defendant purchased. On December 3d, the plaintiff coming home tripped on the planks, fell into the area and was injured. The defendant contended that he was not liable, because the premises were in possession of tenants at the time of the purchase, during whose occupancy the premises had fallen into disrepair.

The court below charged the jury that the defendant would not be liable for the defects in the area, as distinguished from the pavement, but was liable for existence of defects in the pavement over which he had control. The instruction was confirmed by the court above.

The purchaser then, according to this decision, is liable to the public for defects in the pathway, if the property when granted is rented by rooms, or by floors, as, in both cases, the landlord is held to be in possession of the pavement.

In order to grant a privilege or license to another, an owner does not necessarily have to part with the possession. In *White vs. Jameson* (1), the owner and occupier of a ship yard upon which was erected a brick-kiln, within forty-five feet of the cottages of the plaintiff, entered into an agreement with a brick maker to excavate and take away all the clay in the yard to the depth of ten feet or more when required. Soon after the agreement had been entered into, the brick maker erected and lighted the kiln. In answer to the bill for an injunction against both owner and the brick maker, the owner stated that he had authorized the brick maker to burn into bricks the clay found in the yard, but had reserved no power to direct when or how such burning should be carried on; and he denied that he had taken any active part in the erection of the kiln, or burning of the bricks. The defendant contended that he was in no way liable for the acts of the brick maker and ought not to have been a party to the suit.

Sir George Jessel, M. R., quoting the language of Mr. Justice Littledale in *Laugher vs. Pointer* (2), said: "The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants, or by contractors or their servants.

The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the

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(1). L. R. 18 Eq. 303.

(2). 5 B. & C. 547, 560.

premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others."

According to this early statement of Justice Little-dale, it seems to be founded upon an early rule of justice to hold the owner liable for acts done on his land to the prejudice of others, with his own connivance.

Had the owner surrendered possession to the brick maker under a lease, there could be no question as to the liability of the owner for a use of the premises, injurious to third persons, that the owner contemplated in the letting.

The liability then of the owner in possession for acts done on his land by his consent is the same as that for acts done by himself.

## CHAPTER II.

### When Tenant Continues the Nuisance.

The landlord may erect a nuisance on his land, or may suffer his property to become so dilapidated as to be dangerous to the safety of the public, and may grant a lease of the premises in such condition to a tenant, who may, with knowledge of the existing nuisance, or through ignorance, the result of negligence, continue the nuisance so created. Or the landlord may incur liability by failing to repossess himself of and to repair premises of which he granted a lease when the premises were in a good state of repair, but became out of repair before the right to repossess the premises accrued to the owner.

### SECTION 1.

#### When Created Before Original Demise.

Not that the tenant is not liable for continuing a nuisance that was created before the demise to him, but the landlord is also liable for the nuisance that he created (1).

In *Todd vs. Flight* (2), the defendant, the owner of a property, leased it to a tenant when the chimneys were in a decayed and ruinous condition. The damage caused by their fall did not occur until after the demise to the tenant. The defendant contended that the action should have been against the lessee in occupation and not

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(1). *City v. Reiner*, 167 Pa. St. 41. *Borough v. Arthurs*, 152 Pa. 334.

(2). 9 C. B. N. S. 377 (E. C. L. R. vol. 99).



against himself, being the only reversioner. Erle, C. J., said: "In the present case, it is alleged that the defendant let the houses when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state; and thus he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature. We therefore hold that the action lies against the lessor, and the judgment is for the plaintiff."

In the leading case of *Pretty vs. Bickmore* (1), the defendant was the owner of a house, which he let in 1872 on a lease for 21 years, determinable at the end of the first seven or fourteen years, with a covenant by the lessee to keep the premises in repair, the lessor having agreed to put them in repair and convert the lower part into a shop. The tenant entered into possession of the premises and paid rent. Connected with the premises was a coal cellar under the foot path of the public highway. The flap or iron covering of the hole or shoot was at the time of the demise out of repair so as to be dangerous. The plaintiff walking along the foot path stepped upon the flap which gave way, and she was injured.

At the time of the accident, the defendant's workmen were still executing the repairs which he had stipulated to do. But the tenant was in possession and had paid rent. The judge directed a non-suit, on the ground that, as the duty of keeping the premises in repair was by the lease cast upon the tenant, the defendant, the landlord, was not liable. The plaintiff moved for a new trial on the ground of misdirection.

Bovill, C. J., said: "I am of opinion that the non-suit

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(1). L. R. 8 C. P. 401.

was right. The person who is in possession of the premises and who allows the coal plate to be in a dangerous condition is the person responsible to the public for any injury resulting from its being out of repair.

The defendant was not in possession; he had let the premises to a tenant who was bound by his covenant to maintain and repair them. *Prima facie* therefore, the person liable was the tenant. In all the cases where the landlord has been held to be responsible, it will be found that he has done some act authorizing the continuance of the dangerous state of the premises.

The ground of the decision in *Todd vs. Flight* (1) was that the declaration contained an allegation that the defendant let the house when the chimneys were known by him to be ruinous and in danger of falling, and that he kept and maintained them in that state (which allegation must on demurrer be assumed to be true); 'and thus,' says Erle, C. J. 'he was guilty of the wrongful non-repair which led to the damage, and after the demise the fall appears to have arisen from no fault of the lessee, but by the laws of nature.' That is wholly inapplicable to the present case; nor are any of the other cases which have been cited. Here the coal plate was, it seems, in a dangerous and unsafe state; and the defendant let the premises to a tenant who covenanted to maintain and keep them in repair. Under these circumstances, how can it be said that the defendant authorized the thing to be kept in a dangerous state? The simple question is, whether it was the wrongful act of the landlord or of the tenant.

Mr. Campbell Foster (for the plaintiff) says that the tenant was not bound to repair it. I differ from him.

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(1). 9 C. B. N. S. 377 (E. C. L. R. Vol. 99).

The tenant knowing that the coal plate wanted repair, was bound to put it in a safe and proper state. I think there was no obligation on the lessor to do it, and that the lessee would have no remedy over against him. If the duty of repairing had rested upon the landlord, no doubt he would have been liable."

The facts of *Gwinnell vs. Eamer* (1) were similar, and the case was decided on the authority of *Pretty vs. Bickmore*. In his first judgment, Brett, J., said: "If the landlord at the time of the demise knows of the defects, and does nothing to cause it to be remedied, he may be liable too. But I doubt very much whether, if the burden of repair is cast upon the tenant the duty of the landlord does not altogether cease. Here the accident occurred after the demise. If, therefore, the plaintiff has against the landlord."

As gathered from *Pretty vs. Bickmore* and *Gwinnell vs. Eamer*, leading cases in England upon this point, it would seem that the rule in England is that, if the tenant covenants to repair, the landlord is relieved of all responsibility to see that nuisances existing on the premises before the demise, from the want of repair of any part, should be removed, but that the duty of removing is undertaken by the tenant, and the landlord is exonerated.

There is a contrary decision upon this point in New York in the case of *Swords vs. Edgar* (2). The court, though divided on another point, yet was unanimous on this. The lessee had covenanted to repair, and yet the landlord was held liable for the consequences of the want of repair.

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(1). L. R. 10 C. P. 658.

(2). 59 N. Y. 28.

From the general unqualified statement occurring in our Pennsylvania cases, of the rule of law in Pennsylvania of the liability of the landlord for the continuance of a nuisance created before the demise, it would seem that the covenant by the lessee could in no way affect the liability of the landlord in such cases (1). The fact that the premises, from the want of repair of which an accident resulted, had been out of repair for a long time before the tenant occupied, however, does not relieve the tenant or occupier from the duty to guard against the danger to which the public had before been exposed.

In the case of *Coupland vs. Hardingham*, (2) there was an area way in front of the defendant's house. There was no railing to guard the area way from the street. The defendant passing by fell into it and broke his arm. The defense set up was that the premises had been in the same condition as far back as could be remembered, and many years before the defendant was in possession of them.

Lord Ellenborough held, "that however long the premises might have been in this condition, as soon as the defendant took possession of them, he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance. The area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure."

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(1). *City v. Reiner*, 167 Pa. St. 41.

(2). 3 Camp. 398.

## SECTION 2.

**When Created After Original Demise, Though Before Renewal.**

If a landlord grants a term to a tenant, and before the end of the term the tenant either brings a nuisance upon the premises, or the premises became so dilapidated as to constitute a nuisance, by granting a new term, the landlord incurs the same liability as if the premises had been in that condition before the original demise.

It has been held in some cases that, if the landlord has had a right to repossess himself of the premises, that have, before the time when he could have availed himself of this right, become in a condition amounting to a nuisance, by his failure to exercise this right, he incurs the same liability as though he had expressly renewed the term.

On this point we naturally turn to the case of *Gandy vs. Jubber* (1), perhaps the leading case in England on the subject. There the plaintiff had been conversing with a neighbour, who was standing at the door of her house, and on turning round to leave, the plaintiff's foot slipped through an iron grating belonging to the house of the defendant, and she was greatly hurt. The house was let to a Mr. Page, about 1853, by a Mr. Ward, the then owner. There was no evidence of any written lease or of any special terms of letting. The rent was paid quarterly, and the landlord had, from time to time, made necessary repairs. In 1859, Ward died, having devised the house to the defendant in trust. In 1860, Page died and his widow continued to occupy and pay rent to the defendant, who continued to make occasional repairs. There was no evidence as to when the grating was placed

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(1). 5 B & S. 78; 9 id. 15.

over the area, but it had been in a dangerous state for five years before the accident; but it did not appear that the defendant had knowledge or notice of this. The court construed the tenancy as one from year to year.

In his judgment, Crompton, J., said: "The owner, then, being liable for nuisances and obstructions in existence at the date of the demise, it seems clear that he would be equally responsible for reletting the premises with the nuisance upon them, and in this I see no hardship, notwithstanding the absence of notice to him; indeed, on the other hand there would be hardship on the tenant in making him liable for a nuisance existing on premises which he might have taken for a short period only. I think, therefore, that it is a sound principle of law that the owner of property receiving rent should be liable for a nuisance existing on the premises at the date of the demise; and this brings us to the important question in this case, viz: whether what took place was equivalent to a reletting? It seems to me that such would be equivalent to a reletting. It certainly appears that in many cases a tenancy from year to year has been treated as a continuing tenancy; but, on the other hand, Patterson, J., expressly says, in *Tomkins vs. Lawrence* (1) that a tenancy from year to year is to be considered as recommencing every year. I state it to be clear then, that where a tenant having a long lease of premises so uses them as to create a nuisance, the landlord having no power or right of interference, incurs no responsibility; but if having regained possession of the property, the landlord relets it with the nuisance thereupon remaining in such case he is liable; and for this *Rex vs. Pedly* (2),

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(1). 8 C. & P. 720.

(2). 1 A. & E. 822.

is an authority. There Littledale, J., says, p. 827, 'If after the reversion is purchased, the nuisance be erected by the occupier, the reversioner incurs no liability; yet, in such a case, if there were only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had erected a nuisance, the landlord would be liable. This, therefore, is a case in which the reversioner is liable.'

In the subsequent case of *Rich vs. Basterfield* (1), Creswell, J., in delivering the judgment of the Court of Common Pleas, page 804, cites the above judgment of Littledale, J., with approbation, and takes the opportunity of expressing his dissent from the views of Taunton, J., in the same case. The present case, then, seems to me to fall within the principle of that ruling of Littledale, J.

The landlord receives the rent under a yearly tenancy, and his permitting the tenant to remain in occupation year after year without taking steps for the termination of the tenancy is, I think, equivalent to a new letting at the termination of each year. I do not say that the case is altogether free from doubt; but I think the authorities justify us in the view we have taken of the question." The rest of the court concurred.

Pollock says that this decision is inconsistent with later authorities, and that a judgment reversing the decision was actually prepared for delivery in the Exchequer Chamber, but that the plaintiff meanwhile agreed to a *stet. processus* on the recommendation of the court.

In the undelivered opinion of the Exchequer Chamber, the court said: "It may be that Littledale, J., meant to say that in a tenancy from year to year there was a new letting every year, but we should not collect that

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(1). 4 Q. B. 783.

meaning from his language; we should infer that he meant an actual reletting or renewing of the tenancy. The next authority was *Rich vs. Basterfield*; we cannot think that the judgment in this case supports the position contended for. The case of *Rex vs. Pedly* is there discussed, and Cresswell, J., in delivering the judgment, page 804, states his view of Lord Denman's judgment, then that of Littledale, J., and he says 'that learned judge seems to have rested his judgment on the principle that the landlord was not to let the land with a nuisance upon it; and he proceeds: 'here, the periods are short, so that there has been a reletting; and that has taken place after the user of the buildings had created the nuisance.' He therefore assumes that there was an existing nuisance at the time of the letting, which had not afterwards been removed. To this judgment, proceeding on that ground, we entirely assent.' The judgment was in favor of the landlord, and we cannot collect from it that the court intimated any opinion that in a tenancy from year to year there is an annual or periodical reletting. The only other authority relied on is a passage in a ruling at *Nisi Prius* of Patterson, J., in *Tomkins vs. Lawrence*. It was in answer to an alleged variance, and he is reported to have said, p. 731-2, 'As a tenancy from year to year is considered as recommencing every year, the allegation that it commenced in 1836, would be made out, even though the tenancy had first begun on some 16th of November, several years before.' The nature of this tenancy (the court speaking of a tenancy from year to year) is discussed in 4 *Bac. Abr. tit. Leases and terms for years*, p. 838, 839, 7th ed., and this article has always been deemed of the highest au-



thority, being said to be the work of Chief Baron Gilbert. It seems clear that the learned author considered that the true nature of such a tenancy is that it is a lease for one year certain, and that every year after it is a springing interest arising from the first contract and parcel of it, so that if the lessee occupies for a number of years, these years by computation from the time past, make an entire lease for so many years, and that after the commencement of each new year it becomes an entire lease certain for years past and also for the year so entered on, and that it is not reletting at the commencement of the third and subsequent years. We think this is the true nature of a tenancy from year to year created by express words, and that there is not in contemplation of law a recommencing or reletting at the beginning of each year. We therefore think the judgment of the court of Queen's Bench ought to be reversed."

We have in this undelivered decision of the Exchequer Chamber an opinion, founded upon authority, intended for the reversal of the Queen's Bench decision. From the mere fact that the decision was not delivered, we should not disregard it as an authority in any case arising subsequently to the decision. The unanimity of so many and so able judges should impress us with the true value of an authority laid down only after much deliberation—we can presume deliberation from the fact that the decision was intended to be in reversal.

The case of *Sanford vs. Clarke* (1) was one of a weekly tenancy. The plaintiff was injured through a defect in the condition of a coal plate in the pavement in front of a house let by the defendant on a weekly tenancy, and such defect, though not shown to have been in existence

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(1). L. R. 21 Q. B. D. 898.

at the commencement of the tenancy, had existed for nearly two years before the accident.

The plaintiff was non-suited. On a motion to set aside the non-suit and for a new trial, Wills J., said: "I think that this non-suit was clearly wrong, and that there must be a new trial. I express no opinion as to the merits of the plaintiff's case. His case is that a considerable time before the accident happened, this cellar was structurally defective, and that the accident took place in consequence of such defect. The house to which the cellar belonged was let to a weekly tenant, and I think that under the circumstances the continuation of the tenancy involved the same liability as an actual reletting, for it is purely a matter of contract between the parties that the tenancy shall continue, and at its determination at the end of any week the landlord could enter and make the necessary repairs. There is, therefore, nothing to take this case out of the ordinary rule that the owner of property is liable for the consequences of the defective state of repair of the property if it is defective when let by him. In *Gandy vs. Jubber* (1), the tenancy was from year to year, and the court of Queen's Bench held the landlord might have re-entered at the end of each year and that he was therefore liable for the consequences resulting from an accident caused by a grating in front of the house having been for some years in a defective state. In the Exchequer Chamber the decision was overruled on the ground that it proceeded upon a misapprehension of the peculiar relations existing between the landlord and tenant in the case of a tenancy from year to year. Such a tenancy requires something to be done

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(1). 5 B. & S. 78, 9 id. 15.

between the landlord and tenant in order to determine the tenancy, but no such modification is imported into a tenancy from week to week. This case falls clearly within the principle laid down in the court of Queen's Bench in *Gandy vs. Jubber* which was not doubted in the Exchequer Chamber."

Wills, J., in his decision proceeds upon the ground that a weekly tenancy differed from one from year to year in that in the weekly tenancy nothing is required to be done between the landlord and tenant to determine the tenancy.

As to this ground, Wills, J., has the case of *Mills vs. Jones* (1) confronting him, where the court were unanimous to the effect that some notice was necessary to determine a weekly tenancy; while, Williams, J., in that case, expressed a dictum, that a week's notice was necessary to determine a weekly tenancy. It was not a mere dictum in that case, that a weekly tenancy required some notice to determine it, because the case proceeded upon the assumption that such was the case, and what the court expressed was necessarily implied in the decision.

It would seem after consideration, that the true distinction between the opposite rules applied in *Gandy vs. Jubber* and *Sanford vs. Clarke*, depend rather upon the technical nature of a tenancy from year to year, than upon the question as stated by Wills, J., in *Sanford vs. Clarke*, of whether or not something has to be done between the landlord and tenant to determine the tenancy.

It is a question whether or not the distinction made between the above cases would be recognized in Pennsylvania, or whether the landlord would be held liable in either case in this state.

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(1). 100 E. C. L. R. 788.

### CHAPTER III.

#### **When Created Before the Demise, Though Becoming Active After.**

For convenience of treatment, I shall view nuisances created before, but becoming active after a demise, as arising either from the nature of the erection, or from the physical insufficiency of the erection.

And a nuisance arising from the nature of the erection may produce injuries that may be termed, either the natural or the natural and necessary consequence of the nuisance so arising.

The distinction between the natural, and the natural and necessary consequence, is material in England in fixing the liability of the landlord.

#### **SECTION 1.**

##### **When Arising from the Nature of the Erection.**

Of a nuisance arising from the nature of the erection, the cases of *Rex. vs. Pedly* (1) and *Rich vs. Basterfield* (2) are notable examples. These cases, too, show the distinction made in England between the natural, and the natural and necessary consequences of the erection.

*Rex vs. Pedly*.—The defendant was seized of twelve dwelling houses which were let to tenants, and two necessary houses and a sink belonging to them were used in common by the persons occupying the dwelling

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(1). 1 A. & E. 822.

(2). 4 C. B. 783.

houses. The necessary houses were constructed and used by the tenants of those premises before his time.

There was no distinct proof of any actual demise of the necessary houses and sink, but they had regularly been cleansed by the person occupying the dwelling houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents. The only method of draining the places from which the nuisance proceeded was by cutting through a piece of land belonging to the defendant. It thus appeared that the premises were so constructed before the occupants, whether as tenants or mere licences, took possession. Lord Deuman said, "the nuisance here has been a natural consequence of the nature of the erection; therefore, on the principle of *Rex vs. Moore* (1), as well as of the earlier case which shows that the receipt of rent is an upholding of and continuing of the nuisance, the defendant is liable."

In *Rich vs. Basterfield*, the owner erected chimneys, and let the premises with the chimneys erected to a tenant, who, by using the chimneys caused annoyance to his neighbor. It appeared that a former occupier had used coke, and that no injurious smoke then issued from the chimneys. The tenant at the time when the smoke was injurious used a different kind of fuel. Cresswell, J., held that the landlord was not liable, as the injury was not the necessary consequences of the erection. He said that the defendant landlord did not bind the tenant to make any fires at all, nor to make them so as to cause any annoyance.

In discussing *Rex vs. Pedly*, Cresswell, J., said, "To

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(1). 3 B. & Ad. 184.

this we cannot subscribe, notwithstanding the unfeigned respect which we feel to be due to any opinion expressed by that very learned judge; for, it appears to us that, if the landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not; the landlord cannot be made responsible for the acts of the tenant; and a fortiori, he would not be liable, if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate the nuisance, if created. If, then, the *King vs. Pedly* is to be considered as a case in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing, and had not performed it;—we think the judgment right, and that it does not militate against our present decision. But, if it is to be taken as a decision that the landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises,—we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it.”

In *Rex vs. Pedly*, we have a decision that the landlord is liable for injury resulting from the nature of the erection by the natural user of the premises: in *Rich. vs. Basterfield*, that the landlord is not liable for injury resulting from the nature of the erection by the natural use, when the tenant has an option to use it, either in a

manner that produces injury, or in one that does not, but yet choses the one producing the injury.

It would seem that *Rich vs. Basterfield* overrules *Rex vs. Pedly*. It has been said that these two cases entertain different principles. The better view perhaps is that the principle is the same in both, but that the circumstances only in the two cases are different.

In a note to *Taylor on Landlord and Tenant*, assuming the two cases to rest upon different principles, it is that said *Rex vs. Pedly* is sustained by the American cases.

In New York, it would seem by the case of *Pickard vs. Collins* (1), that *Rex vs. Pedly* has been followed, if there be any distinction beyond that of fact. There was there no distinction made between the natural consequence and the natural and necessary consequence. In the charge below, which was affirmed above, the judge said, *inter alia*, "But if you shall find that this barn was noxious and injurious, and a nuisance in fact to the plaintiff, and that defendant located it where it was, and constructed and adapted it so that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, then the defendant is liable for the nuisance thus caused, and the plaintiff is entitled to recover in respect to such nuisance."

In Pennsylvania we have three, perhaps, leading cases in which the principle we are now discussing was involved.

In *Knauss vs. Brua* (2), the plaintiff and defendant owned adjoining houses, that of the defendant being occupied by a tenant. The nuisance complained of was a privy well and sewer connection in the cellar of the de-

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(1). 23 Barb. 444.

(2). 107 Pa. St. 85.

fendant's premises, which, at times, became obstructed, when filthy water percolated through the party wall into the cellar of the plaintiff's house. The jury found that the nuisance to the plaintiff existed on the lot belonging to the defendant after he contracted for its purchase in December, 1881, and before he leased it to his tenant, and continued to exist until the time when the suit was brought; that the nuisance was caused by the condition of the pit of the water closet before it was repaired and by obstructions in the sewer leading from the closet, which was large enough to carry off the deposits in the closets when not obstructed; but that there was not a sufficient fall to be very efficient. Mr. Justice Gordon said: "We do not doubt but that, in the absence of an agreement to repair, the lessor is not liable to a third person for a nuisance resulting from dilapidation in the leasehold premises whilst in possession of a tenant. To make the lessor so liable the defect must be one that arises necessarily from a continuance of the use of the property as it was when the tenant took possession of it. But the converse of this proposition is also true; if the premises are so constructed, or in such a condition, that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result, the landlord is liable."

The jury having found that the privy well was out of repair before the letting, the defendant was liable on that ground alone, without that the nature of the construction contributed to the injury. The statement of the court in reference to the landlord's liability in case the injury results from the nature of the erection, though not strong, as the case appeared to be decided alone on the ground that the well was out of repair when demised



seems to be in accordance with Justice Creswell's decision in *Rich vs. Basterfield*, holding that the landlord is liable only when the injury is the necessary as well as the natural consequence of the nature of the erection.

In the recent case of *Fow vs. Roberts* (1), Mr. Justice Paxson, in delivering the opinion of the court, approved of the language of Mr. Justice Gordon in *Knauss vs. Brua*, and quoted the language of the court in that case. In conclusion, the court in *Fow vs. Roberts* said, "The defendant having demised the premises in question to a tenant with a cesspool so situated thereon that its use must necessarily result in a nuisance to the plaintiff, we are of the opinion that she is liable to the plaintiff. It was urged, however, that it was only for the manner of its use that the well became a nuisance. We fail to see the force of this reasoning. The cesspool was used for the very purpose for which it was constructed, and the tenant had the right to so use it. We cannot measure the extent to which a cesspool may be lawfully used. Its lawful use in this case resulted in a nuisance to the plaintiff; the defendant demised the premises with the cesspool so located that it naturally produced such a result, and for this result we hold her to be liable."

In the case of *Munder vs. McLean* (2), these two last cases were strongly relied upon in granting a new trial. It is clear then that, according to the law of Pennsylvania as laid down in these three cases, the landlord is liable for any injury resulting from a defect in the construction of any part of the premises, even though the injury does not result until after a demise and while the tenant is in possession; and, from the strong language

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(1). 106 Pa. St. 489.

(2). 26 W. N. C. 24; see also *City v. Reiner*, 167 Pa. St. 41.

in *Fow vs. Roberts* and *Knauss vs. Brua*, it would appear that the distinction, made by Creswell, J., in *Rich vs. Basterfield*, between the natural and natural and necessary consequence, is also recognized in Pennsylvania, wherever the circumstances will admit of the distinction.

#### SECTION 2.

##### **When Arising from the Physical Insufficiency of the Erection.**

It is the duty of the owner or builder in building a house, whether for the purpose of an ordinary residence, or for that of something requiring greater support, to so erect it that its physical sufficiency for reasonable use, according to the purpose for which it was intended, will be proof against injury to one lawfully on the premises and using them with due care.

The character of the building, by which the liability of the builder or owner is measured, is fixed by the purpose or design of the builder in erecting it, or by the use contemplated by the owner in the letting. This is well illustrated by the case of *Godley vs. Hagerty* (1), which was affirmed in *Carson vs. Godley* (2).

There the plaintiff, in the employ of a government officer, while storing goods in one of the store houses of the defendant, was injured by the falling of the building. The defendant was the owner of some ground upon which he erected some storehouses, most of which he rented to the Collector of the Port of Philadelphia. The lease was for two years, with a covenant by the Collector to make repairs.

The jury found that when the defendant was contemplating the building of the store houses, in conversation

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(1). 20 Pa. St. 387.

(2). 26 Pa. St. 111.

with the Collector, he (the defendant) was told that, if the government needed storehouses, they would need those of the strongest kind, suitable for the storage of iron and steel, and hardware, and other heavy articles. They also found that the defendant, who was a merchant and not a builder, had used old bricks in the construction, and that elliptical arches were put in, instead of regular arches or strong walls. In his charge to the jury, in the court below, Bell, J., said, *inter alia*, "But in ascertaining whether an owner is obnoxious to a suit, the inquiry may be and often is, did he do all that was incumbent on a prudent, careful and competent man to do, while the building was in progress, or afterwards to render it reasonably secure, having special reference to the uses to which it was to be dedicated? Or did he permit the building to pass from his possession, deficient in some particular essential to its future safety, when reasonably used in the business, and for the purpose for which it was constructed? If from his carelessness, avarice or ignorance, the latter was the condition of the building when it came into the hands of the lessee, whereby injury was inflicted on the person or property of another occupying and using it with due care, the owner or builder, and not the tenant, is he whom the law will compel to make reparation." This part and the whole of the charge was affirmed by the court above.

From the general language of the court of appeal it would seem that the owner would, had the injury occurred to the tenant, have been under the same liability to the tenant, as he was here to the plaintiff, who was treated as a third party, a stranger to lessor and lessee.

## PART II.

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### When Nuisance Created After the Demise.

When the nuisance is created after the demise, the liability of the landlord and tenant may vary according to whether the landlord covenants to repair, whether the injury is the result of the negligence of the tenant, or whether the injury is the result of a use not contemplated by the landlord.

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#### CHAPTER I.

#### When Landlord Covenants to Repair.

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##### SECTION 1.

##### The Common Law Liability of the Occupant. †

By the common law, the occupier and not the landlord is bound as between himself and the public, so far to keep buildings in repair, that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect.

In *Regina vs. Watts* (1), even a tenant at will was held liable for maintaining a house that was dangerous to the public.

The case of *Coupland vs. Hardingham* (2) was an action on the case for negligence in not railing in or guard-

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(1). 1 Salk. 357, 2 L. Raym 856; 3 L. Raym 18.

(2). 3 Camp. 398.

ing an area before the defendant's house, whereby the plaintiff fell down into the area and was severely hurt. The defense set up was, that the premises had been exactly in the same condition as far back as could be remembered, and many years before the defendant was in possession of them. Lord Ellenborough held, that however long the premises might have been in this situation, as soon as the defendant took possession of them he was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance. He said, the area belongs to the house, and it is a duty which the law casts upon the occupier of the house to render it secure.

In *Cheetham vs. Hampson* (1), it was held that an action on the case would not lie against the owner, but only against the occupier, for injury caused by the want of repair in a fence.

In *Bears vs. Ambler* (2), in this State, the law is laid down in accordance with the above cases.

#### SECTION 2.

##### **When the Nuisance Arises from the Part that the Landlord Covenants to Repair.**

When the nuisance arises from the part the landlord covenants to repair, as, by so covenanting, the landlord undertakes the responsibility of looking for repairs, the landlord is liable, at all events to strangers; but to the tenant only after notice, as it is an implied condition of

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(1). 4 T. R. 318.

(2). 9 Barr. 193.

the undertaking by the landlord that the tenant shall notify him.

Although the occupier is *prima facie* liable to the public for nuisance on the premises, yet if he can show that the landlord covenanted or agreed to repair, the landlord is liable for neglect to repair.

*Payne vs. Rogers* (1) was an action on the case against the defendant as owner of a house in the occupation of a tenant, for an injury sustained by the plaintiff by his leg slipping through a hole in the front pavement into a cellar, owing to some plates or bars being out of repair. The plaintiff moved for a non-suit on the ground that the action ought to have been against the actual occupier of the house, whose more immediate business it was to know what repairs were necessary, and to see that they were made, and not against the landlord. It was further argued that the landlord might bear the expense of the repairs, yet as between the occupier and the public, the occupier was bound to look to the state of them, and ought to be liable for any accident that might happen by his neglect.

It was held that if the tenant can prove that the landlord covenanted or agreed to repair, the landlord is liable for neglect to repair. The reason assigned by one of the judges against holding otherwise was that, by so doing, they would encourage circuitry of action, as the tenant would have his remedy over against the landlord.

In *Moore vs. Weber* (2), it was held to be error for the court below to have left it to the jury to infer that there was a contract by the landlord to repair from the fact

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(1). 2 H. Black 849.

(2). 21 P. F. Smith 429.

that the landlord had done repairs. Judge Sharswood said: "Even admitting that this ground could be resorted to under the pleading, it is manifest that the fact that a landlord voluntarily, and at the request of a tenant, does certain repairs is no evidence from which an inference can be drawn, as was here submitted to the jury. It must certainly appear distinctly that the repairs were done under an agreement of some kind. The landlord may erroneously suppose himself bound, or he may do the repairs for the benefit of the property that it may not fall into dilapidation."

Ordinance of the City of Philadelphia of May 3, 1855, provides:

Sec. 3. "Whenever the cartway of any public street, or portion thereof, shall be by councils ordered to be paved, or whenever they may order the paving, grading and curbing of the footway of any street, every owner of ground fronting on such street shall, without delay, at his own cost, cause the footway in front of his ground to be graded, paved with brick or flat stone, and supported by curbstones; and if the owner of such ground shall neglect to grade, pave and curb, as aforesaid, or if the owner of ground in front of any footway shall neglect to repair the same for the space of twenty days after he shall have been thereto required by the Commissioner of Highways, within whose district the same shall be situate, or if the owner is unknown or cannot be found, then after a notice requiring the same shall have been left or placed, or caused to be left or placed upon the said premises by the said Commissioner, he, the said Commissioner or proper authority shall cause the same to be graded, paved and curbed, or repaired, as the case may be, and the charge thereof shall be paid by such owner; and the

same proceedings shall be had for the collection thereof as concerning the collection of the cost of paving the cartway of any public street: Provided, etc."

In the case of *Early vs. Ashwood & Coates* (1), the plaintiff offered in evidence the above ordinance, for the purpose of showing the character of pavement required to be maintained by the owner of the property and his duty to repair. The offer was rejected; and properly, it would seem. It was not shown that the defendant as owner had had notice from the Commissioner; and even if he had had notice, it would hardly seem that such notice would relieve the occupier from his common law liability, and place the same upon the owner, the ordinance being merely a means to place the expense of such improvements and repairs upon the owner, and so of relieving the City of the expense. The purpose of the ordinance would hardly seem to affect the responsibility of the owner to stranger, and alter the common law liability of the tenant or occupier.

#### SECTION 3.

**When the Landlord Covenants or Agrees to Make Specific Repairs.**

If the landlord covenants or agrees to make specific repairs at the execution of the lease, and after the tenant has taken possession, and while the landlord is making such repairs in pursuance of his agreement, injury is suffered by a third person through the want of repair of a part of the premises that was in good condition at the time of the letting, it would seem that the landlord would not be liable. The covenant or agreement to repair only a definite and certain part would not place the responsibility upon the landlord of seeing to general re-

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(1). 1b W. N. C. 142.



pairs, which was not the undertaking of the landlord. The tenant being in possession, the landlord, in being upon the premises to make repairs, could be viewed as being there not otherwise than by a privilege or license from the tenant. It might be otherwise if the tenant surrendered possession temporarily.

In *Pretty vs. Bickmore* (1), at the time of the accident, the landlord was executing repairs that he had agreed to do. As the tenant was in possession, it was generally conceded that the landlord could not on that ground incur liability, and the point was not even raised.

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(1). L. R. 8 C. P. 401.

## CHAPTER II.

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### When the Result of the Negligence of the Tenant.

When the injury arises neither from the nature of the construction, nor from its physical insufficiency, nor from the want of repair at the time of the demise, but from the careless management of the premises by the tenant, provided the tenant has not the connivance of the landlord in such management, the tenant alone is liable.

The case of *Rich vs. Basterfield* (1), discussed above in connection with *Rex. vs. Pedly* (2), when we assume that the distinction made between the natural and the natural and necessary consequence, is well made, is, perhaps, an excellent illustration, under this head, of where the tenant would alone be held liable. There, to be sure, the attempt was to fix the liability upon the landlord; but, inasmuch as the attempt failed by reason of the nice distinction made by Creswell, J., there can be no question but that the tenant would have been held liable, had the action been against him, on the ground of mismanagement to the injury of his neighbor.

In *Somer's Appeal* (3), Storchlein filed a bill in equity against Starr and Somers, setting out that Starr was owner and Somers tenant of a dye house adjoining the plaintiff's house: that by reason of improper construc-

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(1). 1 A. & E. 822.

(2). 4 C. B. 788.

(3). 6 W. N. C. 441.

tion and negligent use, the washings from the dye house flow through the party wall into the plaintiff's cellar and yard, keeping them constantly wet and unfit for use, and injuring the walls and other parts of her property. The bill prayed that the owner should be directed to alter the defects in construction, and the tenants to operate the works in such a way as not to injure the plaintiff's property, and that damages should be awarded against both.

The lease to Somers contained a covenant to keep the premises in good repair, and the master found that he had operated the works in a careless manner, or at least with a disregard of the plaintiff's rights. The master reported in favor of dismissing the bill as to Starr, the owner, and awarding an injunction and \$500 damages against Somers, the tenant. On appeal from the dismissal of exceptions to the report of the master, the court said, *inter alia*, "Undoubtedly, if it was wholly the nature of the premises, and did not arise from the act or neglect of the tenant, there would be great reason in his contention that he (the tenant) ought not to be held responsible. But the master found expressly as a fact, that the appellant had operated the dye works in a careless manner, or at least with a disregard of the rights of the appellee. We cannot say upon an examination of the evidence, that this is palpably and flagrantly wrong. On the contrary, it seems to us to be sustained."

The effect of this decision would seem to be that, if the nature of the premises at the time of the demise is such that, by the exercise of ordinary care in the use of them by the tenant, no injury would result to a third person, if the tenant uses them so carelessly that injury does result, the tenant and not the landlord is liable. This case would further seem to be an excellent exam-

ple of the exact extent of this rule, as here it appeared that it was possible, from the nature of the premises, when used in a careless manner, to produce injury to a third person.

In the comparatively early case of *Offerman vs. Starr* (1), where the defendants, owners of a mine, leased to a tenant for the purpose of mining it. The tenants did not furnish support, whereby the house of the plaintiff was damaged. Gibson, C. J., held that the defendants, the owners, were not liable for the careless manner of working the mines by their tenants, as the defendants had nothing to do with the direction of the business by their tenants. Whether or not the injured party is also a tenant in the same building, the rule applies with equal force; and it would not be attempted to charge the landlord for injuries resulting purely from the negligence of the tenant in using premises that were in good condition at the time of the demise.

In the case of *Killion vs. Power* (2), the plaintiff occupied the first story of a store house; Killion occupied the stories above. Water was introduced into the building from the main in the street, and carried up by a pipe through Power's story to the third story, where it ended in a stop cock in Killion's store, under which there was no drain or waste pipe. There was a stop cock also in Power's store which controlled all the water. When the defendant was absent, one Hughes, with the express or implied assent of the defendant, entered his room in which the stop cock was, and turned it on, by which the plaintiff, who was below, was much damaged. The

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(1). 2 Pa. St. 394.

(2). 51 Pa. St. 429.

charge of the court below,—“If Hughes came upon the premises with the express or implied assent and turned on the water and left it running, and the defendant and his servants failed to turn it off again, there was evidence of negligence on the part of the defendant,”—was affirmed.

### CHAPTER III.

#### **When the Result of a Use not Contemplated by the Landlord.**

It would seem that a distinction should be made between "use"—purpose, and the "manner of enjoying a use or purpose." The distinction is shown by the facts of *Rich vs. Basterfield* (1). There the "use" or purpose was as a coffee house, and the "manner of enjoying the use" was by burning coal, coke or other fuel.

At this point I shall treat of use in the sense of "manner of enjoying a use," inasmuch as the law in reference to "use" in its strict sense is too clear for discussion, a landlord never being liable for an unlawful use or purpose, when he lets for a lawful one, as, if I rent a property, specifying that it is to be used only as a respectable restaurant, and my tenant uses it as a place for immorality without my knowledge.

Under this head, Jackson and Gross refer us to the familiar case of *Rich vs. Basterfield*. There it appeared that the defendant rented the premises as a coffee house. By the use of coal, the chimney, by reason of its situation with respect to the house of the plaintiff, became a nuisance. Former tenants, it appeared, had burnt coke without causing the injurious effect that resulted from the use of coal by the tenant, at the time of the injury. It was held by Creswell, J., that, as the injury was not the necessary consequence of use, according to the purpose for which the premises were rented, but as the injury resulted from the manner in which the purpose was enjoyed, the landlord was not liable.

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(1). 4 Q. B. 783.

In the case of *Harris vs. James* (1), which was an action against the owner and tenant of a field by the occupier of adjoining lands for injury caused to his land by the smoke from certain lime-kilns and by stones and dirt thrown upon it in the process of blasting the limestone in the said field, the owner let the field to the tenant for the purpose of being worked as a lime quarry. The tenant with the consent of the landlord, opened a lime stone quarry in the field, and erected lime-kilns thereon for the purpose of burning lime. The injury was partly the natural and necessary result of lime-kilns being used in the said field, and partly the result of mismanagement. The quarry was worked by means of blasting. The injury from the stones thrown was partly the necessary result of working a quarry in the field, and partly of mismanagement. The court said, "There can be no doubt that where a person authorizes and requires another to commit a nuisance he is liable for that nuisance; and if the authority be given in the shape of a lease he is not the less liable. I do not think when a person demises property he is to be taken to authorize all that the occupier may do. In the present case, as I understand the averments, the field was let for the very purpose and object of being worked as a lime quarry and for erecting lime-kilns and burning lime. When, then, it is stated as a fact that the injury complained of arose from the natural and necessary consequence of carrying out this object, and as the result of lime getting and lime burning, then I think we must say that the landlord authorized the lime burning and the nuisance arising from it as being the necessary consequence of letting the field in the manner and

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(1). 45 L. J. Q. B. 545.

with the objects described." The court distinguished this case from *Rich vs. Basterfield* on the ground that a different conclusion of fact was reached in *Rich vs. Basterfield*, while the two courts proceeded upon the same principle. Referring to *Rich vs. Basterfield*, the court said: "Assuming that the evidence really did establish the facts which the Common Pleas thought it did, and if it was not the necessary consequence of burning fires in the chimney that there should be smoke, I have no fault to find with the decision; but then this case is not the same, because the fifth paragraph finds that the injury arising from the smoke and vapours is the natural and necessary consequence of the use of the land, and the plaintiff must therefore have judgment upon the demurrer to that paragraph."

There is, it would seem, no necessary conflict between these two cases, as the same test of liability was applied in each, viz: was the injury the necessary consequence of the carrying out of the purpose for which the premises were let. The appearing difference is accounted for by the fact that different conclusions of fact were reached in the two cases, it not appearing in *Harris vs. James* (1) that any other manner of working the quarry than by blasting, or of burning the lime in the manner done was possible.

In *Fow vs. Roberts* (2), one of the leading cases in Pennsylvania on this point, the plaintiff owned and occupied a house. Immediately adjoining were certain premises owned by the defendant, and leased to tenants on the premises of the defendant were erected three houses. There was a privy and cesspool for the accommodation

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(1). 45 L. J. Q. B. 545.

(2). 108 Pa. St. 489.



of the occupants of all three houses one foot from the plaintiff's house. The filth and water from said privy ate their way through plaintiff's wall and settled in his cellar, rendering his house unfit for habitation. The court said: "The defendant having demised the premises in question to a tenant with a cesspool so situated thereon that its use must necessarily result in a nuisance to the plaintiff we are of opinion that she is liable to the plaintiff. It was urged, however, that it was only for the manner of its use that the well became a nuisance. We fail to see the force of this reasoning. The cesspool was used for the very purpose for which it was constructed, and the tenant had the right to so use it. We cannot measure the extent to which a cesspool may be lawfully used. Its lawful use resulted in this case in a nuisance to the plaintiff; the defendant demised the premises with the cesspool so located that it would naturally produce such a result and for this result we must hold her to be liable."

The rule, thus, would seem to be the same in Pennsylvania as it is in England, the nuisance (in above case) not having arisen from the manner in which it was used, but as the necessary consequence of the use or purpose for which it was rented.

Jackson and Gross say that *Rich vs. Basterfield* is the law of Pennsylvania. In *Harris vs. James*, one of the judges, Lush, J., hardly approved of the decision, when he said: "As to the case of *Rich vs. Basterfield*, I have always looked upon the decision there as one of excessive refinement." Although the decision has the disapproval of a judge in so late a decision, yet it cannot be considered as overruled. So nice a decision as there made can be of seldom application, as the circumstances of but few cases will admit of such a distinction.

## CHAPTER IV.

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### **.When Landlord in Possession.**

The landlord may be in possession after a demise, either by resuming possession, even if only temporarily, or by continuing in possession after the demise.

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#### **SECTION 1.**

##### **When He Resumes Temporary Possession.**

If a landlord resumes possession temporarily, after a demise, whether for the purpose of fulfilling a covenant in the lease, or for that of preserving the freehold, by so resuming possession and becoming the principal in the carrying on of the improvement or repairs, he incurs liability for the consequences of a nuisance created by those in his employ.

For this proposition we have the comparatively early decision of Lord Mansfield in the case of *Leslie vs. Pounds* (1). There the defendant was the proprietor of a house let to a tenant, who had ceased to occupy the house for the purpose of having it repaired, which was done at the expense of the lessee, but under the superintendence of the defendant landlord. No person slept in the house at the time when the accident occurred, but the tenant had coal in the cellar and paid rent for the house throughout the time. The ac-

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(1). 4 Taun. 647.

cident occurred through a broken cellar door. Mansfield, C. J., said: "It is not necessary to decide whether Daniels (the tenant) or the defendant was the possessor. There is a strong argument, certainly, to say that the possession is in Daniels (the tenant), not in the defendant; but the defendant takes on himself these repairs, not as the agent of Daniels, but as the landlord of the house. He alone is judge of what repairs shall be done, and though Daniels pays for the repairs, yet if the repairs are done substantially, the defendant will have the benefit of it; the defendant determines what the repairs shall be, and directs the repairs; he therefore is the principal, and as a principal, is answerable for the acts of the persons he employs."

The decision certainly seems a strong one. Naturally perhaps, it would seem that, during the term, the tenant would hold the position of principal, especially if bearing the expense of repairs. It would seem then that the real ground of the decision is that ultimate and reversionary interest of the landlord is the only one benefited by substantial repairs.

## SECTION 2.

### **When He Continues in Possession After a Demise.**

Whilst the landlord continues in possession he is liable for the tenant's neglect to repair.

In *Taylor vs. City of New York* (1), a pier belonged to the City of New York, but at the time of the accident it was under a lease to one Edwards. It did not appear whether the lease was a lease of the pier itself, or merely of the right to collect the wharfage of the same. The action was to recover damages for the loss of a horse

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(1). 4 E. D. Smith (N. Y.) 559.

caused by the neglect of the City to repair. The court said, "No copy of that lease is contained in the return, and we cannot, therefore, determine its effect. If it was a grant of the wharfage merely, or of the mere right to collect wharfage from vessels which should lie at or make fast to the pier in question, the grantee in his turn stipulating to pay the defendants an annual sum for this right, I do not think it had any operation to relieve the defendants as owners from the duty to repair." The court then stated that if the exclusive possession was in the lessee, the lessee would be liable, and not the owner. The court next said: "But the grant of the wharfage or of the right to collect the proper rates from vessels which may lie at or make fast to such pier, does not necessarily involve any such consequence. It does not, of necessity, give exclusive possession of the pier to the so-called lessee, and the obligation of the owners to repair, I think, remains, as between them and third persons, in full force."

From the language of the court, it would seem that the whole question depended upon whether or not the lessee had exclusive possession. The distinction as to the liability of the owner is one of degree, whether the owner granted exclusive possession, or only a right in reference to the premises. At first sight, it would seem that, as possession would be incident to the relation of tenant, by such possession, he would exclude the owner. But, again, it does not follow that possession, necessary to the enjoyment and exercise of the rights of a lessee, would necessarily exclude the owner for purposes such as tend to fit the premises for the better enjoyment of them by the tenant, especially if by the consent of the tenant.

It has been held in a leading case in Massachusetts that when a building is rented by two or more tenants, it is the duty of the lessor, in the absence of any express condition to the contrary, to keep the common halls, stairs and passageways in repair; and that the lessor is liable, both to his tenants and third persons rightfully passing over such for injuries caused by the want of repair, on the ground that he continues in possession of such common halls, stairs and passageways.

In *Cole vs. McKey* (1), the defendant leased a hall to a military company, who assumed the duty of repair and not to underlet without the consent of the defendant. Without such consent the company leased it for a skating rink. The plaintiff, in going to it, fell into a hole in the floor of the passageway used for the hall and for other rooms in the same building occupied by other tenants, and was injured. The plaintiff was the mother-in-law of the person to whom the company had underlet, and had gone there for the purpose of enjoying the pleasures of the rink. The plaintiff contended that as the defendant had other tenants in the same building, having a like right of passage, such hallways and stairways must be deemed to have remained in the possession and control of the defendant, and hence that he was responsible for injury by reason of any want of repair therein. The court, after reviewing the authorities cited by the counsel for the plaintiff, came to the conclusion that there was a conflict between the Massachusetts case and other authorities.

The case of *Carstairs vs. Taylor* (2) was referred to and approved by the court, where it was held that the land-

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(1). 66 Wis. 500.

(2). L. R. 6 Exch. 217.

lord, who rented the lower part, and retained possession of the upper part, was liable to the tenant below him, only if he was guilty of negligence. But the decision on the above ground is, perhaps, not strong, as the court considered the additional circumstance that the plaintiff was a mere intruder owing to the breach of the lease not to underlet.

J. B. T.

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## CONTENTS.

|                                                                                     | Page. |
|-------------------------------------------------------------------------------------|-------|
| I. Mistake of Law, . . . . .                                                        | 963   |
| WILLIAM H. LOYD, JR.                                                                |       |
| II. Notes, . . . . .                                                                | 1055  |
| III. The Quiz, . . . . .                                                            | 1059  |
| Can Présents be Recovered on the Wrongful Dissolution of the<br>Agreement to Marry? |       |
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## TABLE OF WORKS CONSULTED.

---

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## TABLE OF CASES CITED.

### Unclassified Cases.

|                                   |                    |
|-----------------------------------|--------------------|
| Bingham vs. Bingham. . . . .      | 11, 12, 14, 34, 35 |
| Brett vs. Rigden. . . . .         | 4                  |
| Catfield vs. Paxton. . . . .      | 7                  |
| Clinton vs. Cholmondeley. . . . . | 10                 |
| Cochrane vs. Willis. . . . .      | 12                 |
| Cook vs. Wotton. . . . .          | 4                  |
| Evans vs. Lewellin. . . . .       | 13                 |
| Farewell vs. Coker. . . . .       | 10                 |
| Harnar vs. Cann. . . . .          | 8                  |
| Haven vs. Foster. . . . .         | 76                 |
| Hobbs vs. Norton. . . . .         | 17                 |
| Irnham vs. Child. . . . .         | 12, 14             |
| Jones vs. Morgan. . . . .         | 13, 14             |
| Jones vs. Randall. . . . .        | 2                  |
| Lansdown vs. Lansdown. . . . .    | 9                  |
| Lyon vs. Richmond. . . . .        | 16, 37, 73         |
| Maner's Case, . . . . .           | 4                  |
| Martindale vs. Falkner. . . . .   | 2                  |
| Onions vs. Tyler. . . . .         | 8                  |
| Penn vs. Baltimore. . . . .       | 15                 |
| Perrot vs. Perrot. . . . .        | 7, 14              |
| Pusey vs. Desbourrie. . . . .     | 11                 |
| Ramsden vs. Hylton. . . . .       | 11                 |
| Regina vs. Tewkesbury. . . . .    | 2                  |
| Shotwell vs. Murray. . . . .      | 16                 |
| Townsend vs. Stangroon. . . . .   | 13                 |
| Turner vs. Turner. . . . .        | 8                  |
| Vernon's Case. . . . .            | 4                  |
| Worral vs. Jacob. . . . .         | 12                 |

### Mistake of Law Accompanied by Independent Equities.

|                                      |    |
|--------------------------------------|----|
| Chestnut Hill Co. vs. Chase. . . . . | 25 |
| Coward vs. Hughes. . . . .           | 25 |
| Cocking vs. Pratt. . . . .           | 25 |
| Jordan vs. Stevens. . . . .          | 25 |
| McCarthy vs. Decaix. . . . .         | 24 |
| Snell vs. Ins. Co. . . . .           | 25 |
| Thomson vs. Eastwood. . . . .        | 25 |

---

### Mistake of an Antecedent Right.

|                                               |                                |
|-----------------------------------------------|--------------------------------|
| Beauchamp vs. Winn. . . . .                   | 33, 34                         |
| Blakeman vs. Blakeman. . . . .                | 41                             |
| Bonney vs. Stroughton. . . . .                | 43                             |
| Boughton vs. Hutt. . . . .                    | 30, 32                         |
| Brown vs. Rice. . . . .                       | 41                             |
| Cooper vs. Phibbs. . . . .                    | 12, 20, 31, 35, 42, 43, 45, 80 |
| Denys vs. Shuckburgh. . . . .                 | 29, 42                         |
| Evans' Appeal. . . . .                        | 42                             |
| Freeman vs. Curtis. . . . .                   | 37, 44                         |
| Freiknecht vs. Meyer. . . . .                 | 42                             |
| Gerdine vs. Menage. . . . .                   | 44                             |
| Gross vs. Lieber. . . . .                     | 39, 40                         |
| Irick vs. Fulton. . . . .                     | 40                             |
| Jones vs. Clifford. . . . .                   | 34                             |
| King vs. Doolittle. . . . .                   | 32                             |
| Lammont vs. Bowley. . . . .                   | 36                             |
| Macknet vs. Macknet. . . . .                  | 42                             |
| Reynell vs. Sprye. . . . .                    | 28                             |
| Saxon Life Assurance Society (In re). . . . . | 29                             |
| Stone vs. Godfrey. . . . .                    | 29                             |
| Underwood vs. Brockman. . . . .               | 37                             |
| Webb vs. Alexandria. . . . .                  | 42                             |
| Good vs. Herr. . . . .                        | 43                             |
| Hamblin vs. Bishop. . . . .                   | 43                             |

|                                        |            |
|----------------------------------------|------------|
| Light vs. Light. . . . .               | 42         |
| Marshall vs. Collet. . . . .           | 29         |
| Wintermute vs. Snyder. . . . .         | 37, 52     |
| Zollman vs. Moore. . . . .             | 40, 41     |
| Champlyn vs. Latyn. . . . .            | 46, 47     |
| Cunningham vs. Cunningham. . . . .     | 47         |
| Gwynn vs. Hamilton. . . . .            | 47         |
| Hall vs. Reed. . . . .                 | 46, 47     |
| Hopkyns vs. Mazyck. . . . .            | 46         |
| Keit vs. Andrews. . . . .              | 47         |
| Lawrence vs. Baubein. . . . .          | 45, 47, 76 |
| Londes vs. Chisholm. . . . .           | 45         |
| Mortimer vs. Pritchard. . . . .        | 46         |
| Schlesinger vs. United States. . . . . | 47         |
| Stoors vs. Barker. . . . .             | 16, 36     |

### Mistake of Legal Effect.

|                                  |                                                        |
|----------------------------------|--------------------------------------------------------|
| Allen vs. Anderson. . . . .      | 60                                                     |
| Allen vs. Galloway. . . . .      | 61                                                     |
| Anderson vs. Tydings. . . . .    | 58                                                     |
| Andrews vs. Coke Co. . . . .     | 61                                                     |
| Arthur vs. Arthur. . . . .       | 58                                                     |
| Broadwell vs. Broadwell. . . . . | 55                                                     |
| Croome vs. Ledyard. . . . .      | 49                                                     |
| Fishback vs. Woodford. . . . .   | 62                                                     |
| Garnar vs. Bird. . . . .         | 57                                                     |
| Gerald vs. Ellery. . . . .       | 60                                                     |
| Gilbert vs. Gilbert. . . . .     | 57                                                     |
| Glenn vs. Statler. . . . .       | 60                                                     |
| Goltra vs. Sanasack. . . . .     | 43, 55                                                 |
| Hart vs. Hart. . . . .           | 57                                                     |
| Heavenridge vs. Monday. . . . .  | 40                                                     |
| Hoover vs. Reilly. . . . .       | 59                                                     |
| Hunt vs. Rousmanier. . . . .     | 13, 14, 19, 37, 43, 45, 51, 54, 57, 58, 61, 62, 65, 70 |
| Kent vs. Bank. . . . .           | 57                                                     |
| Leavitt vs. Palmer. . . . .      | 57                                                     |
| Martin vs. Hamblin. . . . .      | 58                                                     |
| McEllery vs. Shipley. . . . .    | 58                                                     |
| Moorman vs. Collier. . . . .     | 59                                                     |
| Nelson vs. Davis. . . . .        | 60                                                     |
| Oswald vs. Sproule. . . . .      | 55                                                     |
| Powell vs. Smith. . . . .        | 50                                                     |



# MISTAKE OF LAW.

vii

|                                   |               |
|-----------------------------------|---------------|
| Proctor vs. Thrall. . . . .       | 56            |
| Railway vs. Johnson. . . . .      | 34, 49        |
| Rankin vs. Mortimer. . . . .      | 39, 55        |
| Rector vs. Collins. . . . .       | 63            |
| Seibert vs. McAvoy. . . . .       | 61, 65        |
| Showman vs. Miller. . . . .       | 58            |
| Stoddart vs. Hart. . . . .        | 57            |
| Toops vs. Snyder. . . . .         | 60            |
| Wheaton vs. Wheaton. . . . .      | 54            |
| Williamson vs. Hitner. . . . .    | 60            |
| Wood vs. Price. . . . .           | 62            |
| Allen vs. Elder. . . . .          | 64            |
| Beardsley vs. Knight. . . . .     | 56            |
| Bryan vs. Masterson. . . . .      | 62            |
| Clayton vs. Bussey. . . . .       | 64            |
| Clayton vs. Preet. . . . .        | 63            |
| Edwards vs. Norria. . . . .       | 62            |
| Evarts vs. Strobe. . . . .        | 63            |
| Kornegay vs. Everett. . . . .     | 64            |
| Laclem vs. Bacon. . . . .         | 64            |
| Lloyd vs. Bennett. . . . .        | 49            |
| Lucas vs. Lucas. . . . .          | 64            |
| McNaughton vs. Partridge. . . . . | 62            |
| Mower vs. Hutchinson. . . . .     | 56, 57        |
| Stafford vs. Fettera. . . . .     | 71            |
| State vs. Paup. . . . .           | 63            |
| Benson vs. Markol. . . . .        | 67            |
| Canedy vs. Marcy. . . . .         | 65, 67        |
| Cook vs. Husbands. . . . .        | 62            |
| Eastman vs. Association. . . . .  | 67            |
| Griswold vs. Hazard. . . . .      | 59, 68-70, 81 |
| Hausman vs. Burnham. . . . .      | 66            |
| Heacock vs. Fly. . . . .          | 40            |
| Ina. Co. vs. Davis. . . . .       | 66            |
| Kennard vs. George. . . . .       | 67            |
| Mackenzie vs. Mackenzie. . . . .  | 62            |
| Pitcher vs. Hennessy. . . . .     | 66            |
| Steedwell vs. Anderson. . . . .   | 55, 66        |
| Stockbridge vs. Iron Co. . . . .  | 66            |

## Mistake of Law in the Transaction.

|                                   |            |
|-----------------------------------|------------|
| Bentley vs. Wittenmore. . . . .   | 44         |
| Berkenhauser vs. Schmitt. . . . . | 72         |
| Brown vs. Armstead. . . . .       | 72         |
| Carpenter vs. Jonea. . . . .      | 73         |
| Dill vs. Shahan. . . . .          | 72         |
| Gebb vs. Rose. . . . .            | 73         |
| Hampton vs. Nicholson. . . . .    | 71         |
| Hardigree vs. Mitchum. . . . .    | 73         |
| Lapp vs. Lapp. . . . .            | 73         |
| Magniac vs. Thompson. . . . .     | 73         |
| McAnich vs. Laughlin. . . . .     | 72         |
| Moser vs. Libenguth. . . . .      | 52         |
| Peters vs. Florence. . . . .      | 38, 39, 71 |
| Rochester vs. Bank. . . . .       | 72         |
| St. Louis vs. Priest. . . . .     | 72         |
| Teede vs. Johnson. . . . .        | 71         |
| Weed vs. Weed. . . . .            | 73         |

## Money Paid by Mistake of Law.

|                                  |                      |
|----------------------------------|----------------------|
| Bank vs. Daniel. . . . .         | 76                   |
| Beard vs. Beard. . . . .         | 76                   |
| Bilbie vs. Lumley. . . . .       | 3, 6, 14, 73, 75, 77 |
| Brisbane vs. Dacres. . . . .     | 3                    |
| Churchill vs. Bradley. . . . .   | 7                    |
| Edge vs. Koontz. . . . .         | 76                   |
| Goodman vs. Sayers. . . . .      | 74                   |
| Mowatt vs. Wright. . . . .       | 76                   |
| Stevens vs. Lynch. . . . .       | 7, 15                |
| Wilson vs. Sinclair. . . . .     | 3                    |
| Anchor vs. Bank. . . . .         | 6                    |
| Bize vs. Dickinson. . . . .      | 6                    |
| Culbreath vs. Culbreath. . . . . | 76                   |
| Daniel vs. Sinclair. . . . .     | 75                   |
| Farmer vs. Arundel. . . . .      | 5                    |
| James (Ex parte). . . . .        | 75                   |

## MISTAKE OF LAW.

ix

|                              |            |
|------------------------------|------------|
| Levy vs. Bank. . . . .       | 15         |
| Lowry vs. Bourdieu. . . . .  | 5          |
| Mansfield vs. Lynch. . . . . | 76         |
| May vs. Coffin. . . . .      | 15         |
| Northrop vs. Graves. . . . . | 76         |
| Opera Co. (In re). . . . .   | 75         |
| Railway vs. Cripps. . . . .  | 74         |
| Ray vs. Bank. . . . .        | 76         |
| Rodgers vs. Ingham. . . . .  | 29, 74, 80 |
| Tanner vs. Robert. . . . .   | 3          |
| Warden vs. Tucker. . . . .   | 15         |

---

## Compromises.

|                               |    |
|-------------------------------|----|
| Baxendale vs. Seale. . . . .  | 78 |
| Bullack vs. Downes. . . . .   | 79 |
| Clifton vs. Cockburn. . . . . | 75 |
| Cory vs. Cory. . . . .        | 78 |
| Gibbons vs. Caunt. . . . .    | 78 |
| Gordon vs. Gordon. . . . .    | 79 |
| Gormly vs. Gormly. . . . .    | 78 |
| Hall vs. Wheeler. . . . .     | 78 |
| Mills vs. Miller. . . . .     | 78 |
| Naylor vs. Winch. . . . .     | 18 |
| Pullen vs. Ready. . . . .     | 78 |
| Stewart vs. Stewart. . . . .  | 78 |
| Trigg vs. Read. . . . .       | 78 |
| Willen's Appeal. . . . .      | 78 |
| Wistar's Appeal. . . . .      | 79 |

---

## Misrepresentation of Law.

|                                      |    |
|--------------------------------------|----|
| Beattie vs. Ebury. . . . .           | 26 |
| Eaglesfield vs. Londonderry. . . . . | 28 |
| Hirshfield vs. Railway. . . . .      | 26 |
| Kitson vs. Bank. . . . .             | 26 |
| Rashdall vs. Ford. . . . .           | 26 |
| Upton vs. Tribilcock. . . . .        | 26 |



## Mistake of Law.

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It is an axiom of morals that in every individual there is presumed to exist a knowledge of the fundamental principles of ethics, a discernment of right and wrong called conscience or moral sense. (1) So also in the administration of justice, the enforcement of the ethical duties of man, it is presumed that every person, even if ignorant of these obligations maintained by society, must suffer the consequences of a breach of the same, without asserting an ignorance that offends against the common sense of the community. Hence, it was said every man is presumed to know the law, in order that the peace might be preserved and the cherished local customs enforced.

But so plain a method of reasoning could not be applied in the new situations arising with the growth of institutions. "In every law positive," it is said in the Doctor and Student "is somewhat of the law of reason and the law of God, and to discern the law of reason and the law of God from the law positive is very hard." The proposition that the law is known to all can no longer be supported. It was argued before Lord Mansfield that all the laws of the country are presumed clear, evident and certain, but the Chief Justice humorously replied: "As to the certainty of the law, it would be very hard upon the profession if the law was so certain that everybody

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(1) Janet, *Elements of Morals*.

knew it. The misfortune is, that it is so uncertain that it costs much money to know what it is, even to the last resort." (1) Justice Maule, quoting this case (2) observed: "There is no presumption in this Court that every person knows the law. It would be contrary to common sense and reason if it were so. The rule is that ignorance of the law shall not excuse a man, or relieve him from the consequences of a crime or from liability on a contract." (3) Modern society is complex, and the law is a profession requiring special education. But while excused in *foro conscientiae*, the ordinary citizen will not be allowed thus to escape liability for his acts or omissions. The interests of every community imperatively require that a uniform system of justice be observed.

By the law of Rome "*Juris quidem ignorantium cuique nocere, facti vero ignorantium non nocere.*" (4) The most extended discussion is upon the right to recover money paid by mistake of law. In the Code, it is stated that where a person, ignorant of the law pays money which is not due, the right to repetition ceases; for repetition is only allowed in those cases, where what is not due is paid in consequence of an error of fact. (5) Upon the texts a hotly contested war has been waged. Cujas, Donnellus, Voet, (6) Heinneicus, Pothier and Savigny (7) maintain that no action lies, while the opposite view is upheld by

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(1) *Jones vs. Randall*, Cowp. 37, 1774.

(2) *Martindale vs. Falkner*, 2 M. & S. 709, 1846.

(3) *Queen vs. Mayor of Tewksbury*, L. R. 3 Q. B. 629, 1867.

(4) Dig. XX, tit. 29, Chitty's note to Blackstone, IV, 27.

(5) Code lib. I, tit. 18, 110. Just. lib. III, tit. XXVII, sec. 6 & 7.

(6) Voet lib. 12, tit. 6.

(7) System B, 3.

Vinnius, Huber Ultrie and D'Aguesseau. The latter contend that the right of action "can only" (in the words of Vinnius) "be excluded by exceptions founded upon equity upon the opposite side." "For the mere circumstance of my having mistaken the law does not alone give you a just reason for retaining what was not in any manner due to you and in this case melius est favere repetitioni quam adventio lucro."

The same writers endeavor to show that the passages relied upon in the Code were really applied to special cases where a moral obligation existed aside from the mistake.

The great difficulty, as Sir William Evans admits, is the positive law of the Emperors Diocletian and Maximilian which appears indefinitely to negative the right. The weight of authority would seem to incline but slightly in favor of the view of Cujas, the view also of Lord Ellenborough in *Bilbie vs. Lumley*, the case so severely criticised by Sir William Evans in his note to Pothier. (1) The Civil Code of France adopted the views of Vinnius and D'Aguesseau (2) and has been followed in the State of Louisiana. (3) In Scotland, the Court of Sessions held the same opinion until *Wilson vs. Sinclair* (4) came before the House of Lords, where the decision was made to conform to that in *Brisbane vs. Dacres*, the Lord Chancellor stating that there had formerly been some doubt in Westminster Hall. The want of unanimity

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(1) Evans' Pothier on Obligations, Appendix p. 320. See Burge on Conflict of Laws, Vol. 3, p. 729; Lindley on Jurisp. p. 24.

(2) Art. 1377, 2052, 1356.

(3) *Tanner vs. Robert, Martin*, N. S. 260, 1826.

(4) 4 Wils. & Shaw, 398, 1830.

is further displayed in the Codes of Austria and Prussia.

Although the Judges, who have enforced this maxim in the English Courts, have usually strengthened their position by reference to the Civilians quoted above, *ignorantia juris non excusat* has from time immemorial formed part of the Common Law of England. (1) Lord Chief Justice Hale, in his Pleas of the Crown, refers to *Brett vs. Rigden*, (2) Trinity Term 10 Elizabeth, where Sergeant Manwood quotes the maxim and says: "It is to be presumed that no subject of this realm is miscognizant of the law whereby he is governed."

On the other hand, Chitty mentions *Vernon's Case*, (3) where the defendants justified taking away the plaintiff's wife on the ground that they were accompanying her to Westminster to sue for a divorce. It was objected to the plea that the defendants should have taken her to the metropolitan, but the plea was held good, "for perhaps they had not knowledge of the law" as to where the divorce should be sued. In *Manser's Case*, (4) the defendant pleaded that a release was to be sealed; but because defendant's son could not read he prayed plaintiff to deliver it to him to show to counsel, but upon view of record of a judgment, anno 16 Eliz. between Sir Anthony Cook and Wotton, (5) that upon request Sir Anthony, who was not learned in the law, was obliged to seal at his peril, it was resolved according to the said judgment. "It is

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(1) Blackstone, IV, 27, Hale Pl. Cr. 42.

(2) Plowd. 340, 1568.

(3) Mich. 20. Henry VII, fol. 2, pl. 4.

(4) 2 Coke 3 a & b., 1608.

(5) 4 Leon. 63 and 190, 1584.



to be observed," said Lord Coke, "that ignorantia est duplex viz. facti et juris, but as is commonly said, ignorantia juris non excusat." Other examples might be found of the same character, where the rule was applied as above on both the criminal and civil sides of the Court, but those given above are the ones most familiar to discussions on this subject. In "The Dialogues of Doctor and Student," the following ingenious explanation is given: "Ignorance of the law does not excuse, and the cause is this, that there is no statute made in this realm but by the consent of the lords spiritual and temporal, and of all the commons, that is to say, by the knights of the shire, the citizens and burgesses, which in the Parliament represent the estate of the whole commons, and every statute there made is of as strong effect as if all the commons were there personally at the making thereof." (1)

This suggestion, tempting to the student of Constitutional law, has not found its way into the reports.

In the Common Law Courts the branch of this subject that required most frequent attention, just as previously at Rome, was the recovery of money paid by mistake. At first in fugitive dicta, later in more comprehensive statements, the question was discussed and seemingly settled for all time. In *Farmer vs. Atundel*, (2) Chief Justice De Gray said, "Where money is paid by one man to another on mistake either of law or fact or by deceit, assumpsit will lie." This dictum has often been quoted by those favoring repayment: *Lowry vs. Bourdieu*, (3) was a case before

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(1) Dialogue 11, ch. 46.

(2) 2 Wm. Bl. 824, 1772.

(3) Dougl. 468, 1780.

Lord Mansfield, C. J. where the plaintiff endeavored to recover a premium paid on an insurance policy, void for want of interest. The question of mistake was incidentally discussed by Justices Buller and Willes, and Lord Mansfield desired it not to be understood that in all cases money could not be recovered when paid on an illegal consideration, particularly if the parties were not in *pari delicto*. (1) In *Bize vs. Dickinson*, (2) the question was fairly before the Court. The debtor of a bankrupt paid the amount of his debt, without taking advantage of a set-off to which he was entitled, in ignorance of his right. Lord Mansfield gave judgment for the plaintiff saying, "Where money is paid, under a mistake of law, which there was no ground to claim in conscience, the party may recover it back in this kind of action."

These earlier cases are not only few in number, but also too varied in their circumstances to call for a direct decision. It is a source of regret that Lord Mansfield, whose leanings are so evident, did not fully review the authorities and determine the question in his vigorous and comprehensive style. Few precedents are quoted, but the inclination of the Courts is most clearly to disregard the distinction between mistake of fact and law and to allow a recovery of money in every case, where it was against good conscience for the defendant to retain it. *Bilbie vs. Lumley* (3) checked the previous tendency of the Courts and at the same time settled the law of England. An action was brought to recover a sum of money paid on an insur-

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(1) *Anchor vs. Bank*, Dougl. 637, 1781.

(2) 1 Term Rep. 285, 1786.

(3) 2 East 469, 1802.

ance policy. It was insisted that the money had been paid under a mistake of law, the plaintiff not knowing at the time of payment that the concealment of a material letter was a defence. On argument for a new trial, Lord Ellenborough asked the counsel for plaintiff, whether he could state any case where money had been recovered back when paid by mistake of law. If counsel had been prepared with the cases of Lord Mansfield's time the result might have been different. As it was, counsel gave no answer at all. The Chief Justice then touched upon the doubtful case of Catfield vs. Paxton (1) and said: "Every man must be taken to be cognizant of the law, otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in every case." The doctrine in Bilbie vs. Lumley has met with approval both in the Courts of England and in many of the Courts in this country

In Stevens vs. Lynch (2) the Court went so far as to hold the drawer of a bill of exchange liable on a new promise made under the mistaken belief that he was liable on the old. (3)

But when Lord Ellenborough's decision is cited as an authority in a Court of Equity on the *general rule*, it is necessary to call attention to his decision in Perrot vs. Perrot (4), nine years later, in the Court of King's Bench. The donee of a power of appointment executed the same by deed, but later, under the mistaken belief that she had provided just as effectual an appointment by her will, she cut from the

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(1) 2 East 471.

(2) 12 East 37, 1810.

(3) Churchill vs. Bradley, 58 Vt. 403, 1886.

(4) 14 East 423, 1811.

deed her signature and seal. The only question was, whether this was an effectual cancellation, and Lord Ellenborough thought the animus cancellandi wanting. "She mistook either the contents of her will, which would be a mistake of fact, or its legal operation, which would be a mistake of law, and *in either* case we think the mistake annulled the cancellation. *Onions vs. Tryer* (1) is a strong authority that a mistake in point of law may destroy the effect of a cancellation; and when once it is clearly established that a mistake in point of fact may also destroy it, it seems difficult, upon principle, to say that a mistake of law clearly evidenced by what occurs at the time of cancelling would not have the same operation."

It is but natural that the maxim *ignorantia juris non excusat* should have been discussed in the High Court of Chancery at an early date. In *Harmar vs. Cann* (2) it was said that ignorance of the law would not be relieved against in a Court of Equity.

If such was the case, it is difficult to understand *Turner vs. Turner*, (3) where an executor, who had released a mortgage to the heir, believing the title vested in him and in ignorance of his own right, was relieved by Lord Chancellor Nottingham. But if it were possible to settle a question by the overwhelming authority of judicial dicta this subject would need no discussion. The rule has met with approval on every occasion. But under the guise of exceptions, one is confronted with such a formidable array of cases that the rule itself becomes a subject of

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(1) 1 P. Wms. 345, 1706.

(2) 4 Vinier's Abr. 387 1615.

(3) 2 Rep. Ch. 81, 1680.

doubt. The conclusion, at least, may be drawn that equity has on numerous occasions relieved against mistakes of law and the difficulties arise rather in attempting to reconcile the conflicting theories evolved than in endeavoring to dispute this most palpable fact. The caution of the early text writers is justified when the cases in England during the eighteenth century are considered. Many of these lie so close to the border-line of other equities that their value as precedents upon mistake of law is greatly impaired.

The case of *Lansdown vs. Lansdown* (1) has proved a stumbling block to judge and commentator. The dispute was as to the right of succession to the land of a deceased brother. A neighbor who acted as arbitrator erroneously decided in favor of the youngest of the family, whereupon the eldest agreed to divide. Lord Chancellor King set aside the deed conveying a moiety "as being obtained by mistake," and his Lordship said further, that the maxim referred to the public law, that ignorance could not be pleaded in excuse of crimes, but did not hold in civil cases. This statement, says Story, (2) is wholly irreconcilable with the established doctrine, and it is true that in no other case has a similar distinction been drawn. In the face of universal disapprobation, the dictum may be regarded as incorrect. Whether or not the relief was properly afforded is a matter open to argument. Story would place it in that class of cases, where a clear and palpable rule of law is mistaken and relief granted just as in the case of surprise.

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(1) Mosely, 364, 1730.

(2) Story's Eq. Jur. sec. 116.

It would also be regarded as coming within that class suggested by recent writers where the mistake relieved against concerned a pre-existing right. Such is the view of Pomeroy. But that a compromise reasonably entered into should have been set aside in the manner reported, indicates either that there were additional facts not reported by Mosely, or that an exceedingly pliable rule prevailed in the time of Lord Chancellor King.

Sir William Grant in *Cholmondeley vs. Clinton* (1) gives the particulars of an unreported case decided by Lord King a few years before *Lansdown vs. Lansdown*. (2) A bill was filed by a reversioner to set aside a general release to the tenant in tail, on the ground that her intention was merely to discharge the estate of a charge to which she was entitled under a settlement. Lord King directed two issues to be tried. First, whether the appellant knew she was entitled to the reversion; and second, whether she intended by the release to pass the reversion; a finding in her favor in either case entitling her to relief. It is conceived that relief given under the first issue framed, would be on the ground that the mistake was one as to title, a mistake of a pre-existing right. But relief under the second issue would be setting aside an agreement where the mistake was as to the legal effect of the instrument. Lord King does not seem to have doubted for a moment that the Court was justified in interfering, and the decree was affirmed in the House of Lords.

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(1) 2 Meriv. 253, 1817.

(2) *Farewell vs. Coker*, Reg. Lib. A. fol. 197, 1726.

In *Pusey vs. Desbouvrie* (1) the question was incidentally before the Court and the decision pointed in favor of a lenient rule. The bill was to set aside a release of orphanage-right by acceptance of a legacy. "It seems hard," observed Lord Chancellor Talbot, "that a young woman should suffer for her ignorance of the law or of the custom of London. I hardly think she knew that she was entitled to an account." This is not an unmixed case of mistake, but the words have been thought important. (2) In *Bingham vs. Bingham* (3) we have a decision that has aroused much discussion. A bill was filed to have refunded money, paid by the complainant in buying a release from defendant of a supposed right, which he had threatened to enforce by ejectment. Fortescue, sitting for Lord Hardwicke, decreed for the plaintiff on the ground that, while no fraud appeared and the defendant apprehended he had a title, yet there was a plain mistake such as the Court was warranted to relieve against, and not to suffer the defendant to run away with the money paid in consideration of the sale of an estate to which he had no right. This much-discussed case, Lord Brougham thought, was upon the very border line of the two kinds of error, and was rather to be classed as an instance of mistake of fact than of law. It has been said that the case involved a question of fraud, but the facts as taken from the Register's Book disprove any such theory. (4) There seems to have been an open dispute as to the validity of the devise under

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(1) 3 P. Wms. 315, 1734.

(2) *Ramsden vs. Hylton*, 2 Ves. Sr. 304, 1751.

(3) 1 Ves. Sr. 126, 1748.

(4) Ves. Sr. Ch. Sup. 79, 1748.

which the plaintiff held. The plaintiff in his bill stated that he was ignorant of the law and consequently persuaded that the devise was invalid. The defendant in his answer still insisted on the invalidity, but nevertheless, he argued, the plaintiff should have been better advised before he parted with his title money, "for that all purchases were to be at the peril of the purchaser." There was at the most nothing more than an innocent misstatement of the effect of the will. *Bingham vs. Bingham* is approved in *Cochrane vs. Willis* (1) by Lord Justice Turner, and in *Cooper vs. Phibbs*, (2) Lord Cranworth declares that the doctrine there acted upon was the perfectly correct one. Vice-Chancellor Hall, commenting on this, remarks: "Nothing can be clearer than this, that Lord Cranworth recognized the principle that the Court would, even in the case of a completed contract, give relief against a common mistake in the same way that it would against fraud." A different phase of the subject is presented in *Irnham vs. Child* (3), where the object of the bill was to obtain the reformation of a deed, by inserting a clause which had been purposely omitted under the mistaken notion that it would render the deed void. Lord Thurlow excluded evidence to prove an agreement to insert the clause, on the ground that there was no intention that it should take any part of the instrument as finally adopted. (4) The decision is referred to by Justice Washington, in *Hunt vs.*

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(1) L. R. 1 Ch. App. 64, 1865.

(2) L. R. 2 H. L. 149, 1867.

(3) 1 Br. C. C. 92, 1781.

(4) *Worral vs. Jacob*, 3 Meriv. 271, 1817.



Rousmanier, (1) and is regarded as belonging in the same class as the latter case. But Lord Thurlow was not without doubts, and observed that mistake in point of law was *said* to be equal to a mistake in point of fact.

The case went, as is pointed out by Lord Eldon, (2) "Upon an indisputably clear principle that the parties did not mean to insert in the agreement a provision for redemption, and they desired the Court not to do what they intended, for the insertion of that provision was directly contrary to their intention; but they desired to be put in the same situation as if they had been better informed and consequently had a contrary intention." In contrast with the above, we have the words of Lord Thurlow, two years later, in *Jones vs. Morgan*: (3) "If the presumptions of the family that the testator had charged an incumbrance were founded on a mistaken notion of the law, it might be set right at any distance of time,"—an indication that Lord Thurlow believed it within the province of a Court of Chancery to relieve in a proper case.

There is some doubt as to what were the grounds for setting aside the deed in *Evans vs. Lewellin*. (4) In *Brown's Reports*, the case is put altogether on surprise and undue influence, but in *Cox* it is said that the plaintiff *was* informed of his rights. The deed was set aside as "improvidently obtained." "I will not use any harsh terms," said the Master of the Rolls, "for in truth I do not think the case

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(1) 8 Wheat. 174, 1823.

(2) *Townsend vs. Stangroom*, 6 Ves. 332, 1801.

(3) 1 Bro. C. C. 190, 1783.

(4) 1 Cox Rep. 33. 2 Br. C. C. 150, 1787.

calls for it." It will be remarked upon review that in none of these cases decided in the eighteenth century will be found a full statement of the law upon this subject as understood by the Courts of that period. In almost every instance, there were facts giving rise to independent equities, aside from mere error of law, circumstances of which the Courts will always gladly lay hold, in order to avoid the assumption of a jurisdiction less warranted by precedent. As the discussion usually turns upon questions of fact without reference to authority, the maxim is seldom referred to or quoted.

The Judge, who decided *Bilbie vs. Lumley*, determined *Perrot vs. Perrot*. The Chancellor, favorably inclined toward relief in *Jones vs. Morgan*, opposed it in *Irnham vs. Child*. Each case apparently stands on its own merits as found by the Court. But while it is true that during this period no authoritative and formal assumption of such jurisdiction can be found, the fact is certainly disclosed that in no case was it ever asserted that to correct a mistake of law was not within the province of a Court of Chancery. It is certainly a significant fact that *Bingham vs. Bingham*, the most important case of this period, has never been questioned, but on the contrary, distinctly approved on several occasions.

It is said that the opening of a new century lags thirty years behind the date in the calendar, and that 1830 rather than 1800, marks the beginning of our era. There will be no impropriety therefore considering the few early American cases prior to *Hunt vs. Rousmanier*, before proceeding to the consideration of the more modern doctrines of mistake of law.

*Levy vs. The Bank of the United States*, (1) is one of the earliest cases and affords an interesting contrast to *Stevens vs. Lynch*. (2) In an action by a depositor to charge the bank with the amount of a forged check, which he claimed should have been credited to his account, it was set up in defence that he had waived his right, having said, "If it is a forgery it is no deposit." "If he had said this deliberately," remarked Chief Justice Shippen, "knowing his right, it might have been obligatory on him, but it was the expression of an opinion of what he was willing to allow and being under a mistake of his right he was not bound by it. The case of *Penn vs. Lord Baltimore*, (3) is decisive to this point. I was present at the argument and heard Lord Hardwicke say, though it is not mentioned in the printed report, that if Lord Baltimore made the agreement in question under a mistake of his right to another degree of latitude, he ought to be relieved, but he was not mistaken." This case has seldom been noticed and the Courts of Pennsylvania have widely departed from the opinion of Judge Shippen. A very similar case occurred in Massachusetts, where the Court was satisfied that what the defendant had said ought not to bind him. (4) A consideration of these cases belongs properly under the subject of money paid by mistake of law.

Chancellor Kent exercised a powerful influence in favor of the maxim by three decisions that have

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(1) 1 Binney 27, 1802.

(2) *Supra*.

(3) 1 Ves. 444, 1748.

(4) *May vs. Coffin*, 4 Mass. 341, 1808. *Warden vs. Tucker*, 7 Mass. 452, 1811.

become perhaps the best known and most extensively quoted opinions in the American State Courts on this question. In *Shotwell vs. Murray*, (1) the plaintiff, knowing of an outstanding incumbrance purchased in confidence that the premises would be exonerated. Chancellor Kent dismissed the bill, praying for an injunction to stay execution, saying that "no one can be allowed to avoid the operation of an agreement entered into with full knowledge of the facts, on the ground of ignorance of their legal consequences." The want of ordinary care displayed by the plaintiff in the transaction would, it is conceived, be alone sufficient to deprive him of any equitable right, *Lyon vs. Richmond* (2) was decided in the following year. The facts were complicated and the decision upon them overruled, but the language of the opinion is constantly quoted:

"The Courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of the facts, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind."

Six years later, in *Stoors vs. Barker* (3) mistake of his legal rights was set up by the defendant to prevent the operation of an estoppel. The Chancellor held that ignorance of the law cannot *generally* be set up as a defence, and that ignorance of one's legal right did not take the case out of the rule, when the cir-

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(1) 1 John Ch. 512, 1815.

(2) 2 Johns' Ch. 60, 1816.

(3) 6 Johns' Ch. 166, 1822.

cumstances would otherwise create an equitable bar to the legal title. *Hobbs vs. Norton* (1) he thought directly in point. If the doctrine of estoppel has its foundation in fraud, Chancellor Kent certainly went very far in holding that the presumption of a knowledge of the law is so strong as to fulfill the requirement of equity that there must be actual knowledge to create an estoppel that will bar a right. The decision, however, has had a wide influence. Indeed, to the influence of Chancellor Kent may be traced the strong tendency at one time displayed in the American Courts to narrow rather than extend the exceptions to the maxim and to hold that "all must lie in the same procrustean bed."

It cannot, therefore, be shown that, in the early cases, either in America or in England, any general rule has been stated on principle and supported by authority. And although hardly a year has passed during which the subject has not been agitated in the Courts, the same lack of continuity of reasoning is apparent down to the present time.

The subject does not seem at first sight so broad as to defy the codifying powers of the commentators. Eliminating the questions of fact that must of necessity arise in these cases, it would not seem impossible to obtain a few definite working principles that could be used in creating order out of chaos. Numerous efforts have been made by the writers to solve the problem. But it cannot be said that any solution yet offered has met with the general approval of the Courts, and few have stood the test of adverse criticism by rival theorists. It will be useful to survey

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(1) 1 Vernon, 136, 1682.

the suggestion offered in some of the leading books and the replies that have been called forth from other writers.

Story (1) has devoted care and thought to the subject and a most valuable argument for the maxim will be found in his work, where it is shown that the aim of the Common Law is "the practical good rather than the theoretical perfection" and to seek less to administer justice in all possible cases than to furnish rules which shall secure it in the common course of human business. The doctrine, he declares, must be laid down in a guarded and qualified manner, for it is not to be disguised that there are authorities supposed to contradict it, or at least form exceptions. He attempts to explain the more difficult cases by maintaining the doctrine that if a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his undisputed property to another, equity will relieve him. This view is severely criticised by Pomeroy, (2) who declares that it is directly opposed to the fundamental principle upon which the entire doctrine of mistake of law is founded, and that its true limitation is accurately stated by Mr. Adams (3) in confining it to cases of family compromise. *Naylor vs. Winch*, the case most relied on by Story, was one of family compromise, and common sense will allow that if, as a universal rule, mistake of a *clear* principle is to be relieved, a fortiori should the same result follow in the case of a *doubtful* principle. This suggestion of

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(1) Equity Jurisp. sec. 110.

(2) Equity Jurisp. sec. 846.

(3) Adams' Equity, 190.

Story's will not account for many decisions, where relief has been granted, and is too narrow to form the basis of a system. Story himself acknowledges that the distinction between cases of mistake of a plain and settled principle and cases of mistake of a principle not plain to persons generally, but which is yet *constructively certain* as a foundation of title is not of itself very intelligible. But in summing up he insists that the real exceptions are few, and that the present disposition of the American Courts is "to narrow rather than enlarge the operation of exceptions"—a correct statement, for such *was* the tendency of the Courts of the time he wrote.

A notable attempt to find a prevailing principle is that of Mr. Melville M. Bigelow published in the *Law Quarterly Review* (1) and also as a note to the thirteenth edition of Story's "Equity Jurisprudence." The gist of his method (to use his own words) is to begin with a set of propositions applicable as a general working theory to the case of mistake of law, and mistake of fact alike. If relief is to be given, it must be given on the ground of want of union of minds; if the parties have agreed upon the law, then be their view right or wrong, there can be no relief.

In the decision of *Hunt vs. Rousmanier* he finds the true principle so far as the *denial* of relief is concerned. "Here was the whole case, deliberation with knowledge of the safe course (though not as safe) and choice of the unsafe." Now it may be true, as he states, that in the majority of cases where relief has been granted the element of choice between the safe and unsafe course was absent, yet it is equally true

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(1) Vol. 1, p. 298.

that in numerous cases where relief was refused, the mistaken course was the only one suggested to the parties, as in all cases where the Court has declined to relieve a mistake as to pre-existing right. "If there is no possibility of choice," he urges, "there is no true assent, and relief should be granted." There is a practical acknowledgment in this that ignorance of the law, precluding true consent, is ground for relief in all cases.

Kerr declares (1) that the maxim is not of universal application in Courts of Equity and he adopts the language of Lord Westbury in *Cooper vs. Phibbs*. The doctrine of that case will be considered later, but it may be premised that the theory there announced and adopted by Kerr is difficult to reconcile with the views that have generally prevailed in the Courts. For example, in that large class of cases where mistake of the legal effect of an agreement has been held not entitled to relief, such cases, in nearly every instance, involve errors in regard to private rights and would come within the exception if the dicta of Lord Westbury were taken literally.

Mr. Charles A. Buckman in his article in the *Central Law Journal* (2) deals principally with cases of money paid under mistake, but he seems to support the very questionable distinction taken in South Carolina between ignorance of law and mistake of law. (3)

In the same volume an annotation by Mr. Joseph A. Joyce contributes to increase the confusion. This

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(1) *Fraud and Mistake*, p. 398.

(2) *Cent. Law Jour.*, Vol. 17, p. 22, 1883.

(3) *Cent. Law Jour.* Vol. 17, p. 422.



article aroused Mr. Crosby Johnson to the defence of the maxim in the following year. (1) "Some of the Courts," he complains, "seem not to have observed the fundamental character of this rule, but treating it as a rule of convenience only, have granted relief against mistakes of law in the very teeth of the rule. The intention that a *mutual* mistake forms an exception to the rule meets with his disapproval. "It is a recognized principle of jurisprudence that a complainant must recover on the strength of his own title. How can a supposed defect in the title of an adversary furnish ground for relief? If neither standing alone had adequate grounds for relief, it is difficult to understand how, when they are adversely opposed, they can strengthen each other." Professor Pomeroy has, in recent years, attempted to state a general formula. (2) He finds that where the general law, the ordinary *jus*, is mistaken, no relief can be had, nor where the parties are in error as to the legal effect of an agreement. The only true exception, he declares, will be found in those cases where a person is ignorant or mistaken as to his antecedent or existing rights, interests, liabilities, or other relations. "Mistakes," he writes, "of a person with respect to his private legal rights, may be properly regarded, as in a great measure they are, and may be dealt with as mistakes of fact." Mr. Crosby Johnson finds fault with this theory and declares it a calling of a thing by one name for one purpose and by a different name for another. It is difficult, of course, to form

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(1) Cent. Law Journal, Vol. 18, p. 7, 1884.

(2) Pomeroy, Eq. Juris. Vol. 11, p. 849.

a distinct notion of a "legal right" separated from the facts in which it is involved. But, he argues, if relief is to be given where the *facts* are known, because the party misapprehended their legal effect upon his rights; relief ought to be given as against an instrument. Pomeroy's rule, he holds, will open the doors of relief to cases not entitled to it.

Pomeroy has shown the fallacies underlying two theories largely accepted. Almost all the cases where relief has been given on ground of *mutual mistake*, will be found among the ordinary examples of error in the descriptions of deeds or the import of technical terms. His criticism of Story's suggestion has already been discussed, the cases really belonging, he insists, under the head of mistake of an existing right.

The want of harmony in the views expressed by these writers is most evident, each fluently and with apparent ease condemning the theory of his predecessor. It should be observed that several of the theories contain most useful suggestions, and all reflect, in a measure, the varying tendencies of the Courts. A formula that will be useful for the guidance of Courts of Chancery must not only harmonize past decisions, but present a rule flexible enough to meet the practical needs of equity. Ingenuity may accomplish the former, but fulfillment of the latter condition can be shown only by experience. Of the solutions given above, all probably have influenced isolated cases; no one, however, has so far met with universal acceptance, certainly not for want of opportunity, for the subject is constantly before the Courts. A tendency can be noted, nevertheless,

in all forms to separate the decisions into certain recognized groups, and in this way some classes of cases can be dismissed with little difficulty.

Beginning with that part of the subject least involved in doubt, it will be found that there are three groups, in each of which, owing to the policy of the law or to special circumstances involved, there is a decided preponderance of authority in one direction. Where the mistake involves independent equities, relief will always be given. On the other hand, where money is paid by mistake of law, or where a doubtful right is compromised, it is not usual for the Courts to afford relief.

Again: where equity is asked to interfere for the purpose of correcting or setting aside a transaction entered into by mistake of law, such mistake may occur in three different ways. First, the mistake of law may have reference to a right *precedent* to the transaction; or second, the mistake of law may be in regard to the very *transaction itself*; or, third, the mistake of law may have reference to the *subsequent effect* of the transaction upon the rights of the parties. A rough classification of this kind has grown up in recent years and has been unconsciously acted on by the Courts. The first group, where the mistake as to the transaction has gone under several names, but the most suitable is that given by Pomeroy, who calls it mistake of a pre-existing right. The third group will be easily recognized as including that large class of cases where the parties were correctly informed as to the character of the transaction, but were in error as to its future legal effects. While the second group includes those cases

where a party has adopted a wrong course of action, where his act is void or illegal, and without doubt is the class that the maxim was really designed to meet. Six groups of cases, therefore, are to be treated, and it will be best to consider them in the order in which the Courts have shown a greater tendency to grant relief.

### **I. Mistake of Law Accompanied by Independent Equities.**

The principle governing relief where the mistake of law is accompanied by independent equities has been concisely stated by Professor Bispham: "Whether equity will or will not interfere in the case of a pure mistake of law, and whatever may be the true distinction to be taken between the cases, it is nevertheless clear that any additional circumstances will be readily laid hold of by the Court as constituting sufficient grounds for interposition." (1) Fraud, misrepresentation, undue influence, and fiduciary relations are some of the forms in which these super-added equities become manifest. As the merits of the rule are obvious and as there are no reasons for denying relief on grounds of public policy, indeed quite the reverse, jurisdiction has not been disputed, even where the wrong was merely an element. In *McCarty vs. Decaix* (2) where the plaintiff had surrendered his rights in his deceased wife's estate, Lord Brougham found that "his ignorance was not shared in an equal degree by the parties with whom

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(1) Bispham's Principles of Equity, sec. 188.

(2) 2 Rus. & Myl. 614, 1831.

he was dealing" and decided the agreement invalid in accordance with the principles laid down by Sir John Strange, M. R. (1) There must be full disclosure or such a transaction cannot be sanctioned. Thus, in *Coward vs. Hughes*, a bill was filed to have cancelled a promissory note given in place of one upon which the complainant was not liable, a fact not disclosed by respondent and Vice-Chancellor Wood gave the relief asked. (2)

In *Thompson vs. Eastwood*, (3) the question of fiduciary relations is discussed. A trustee having disputed the payment of a legacy and obtained a release from the legatee for one-tenth of the full amount, Lord Cairns said, "There was a state of mind on the part of all the parties which shows an utter and entire mistake as to what was material to the title of the legatee. With no evidence to fix any fraudulent motive or design, I find that the trustee was repudiating the title of the cestui que trust, a transaction the Court would not allow to stand."

In the American Courts this doctrine has been uniformly upheld. (4) In *Jordan vs. Stevens* (5) a life tenant was induced to surrender rights, doubts having been cast upon her title. No fraud was disclosed, but the mistake was induced by the representations made by the defendants. "Although the weight of authority," said the Court "is against granting relief *merely* on account of mistake of law,

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(1) *Cocking vs. Pratt*, 1 Ves. Sr. 400.

(2) 1 K. & J. 443, 1855.

(3) L. R. 2 Appeal Cases, 215, 1877.

(4) *Chestnut Hill Co. vs. Chase*, 14 Conn. 123, 1840. *Snell vs. Ins. Co.* 98 U. S. 85, 1878.

(5) 51 Me. 78, 1863.

there are cases where there are other elements, not in themselves sufficient to authorize the Court to interpose, but which combined with such a mistake will entitle the party to relief." Pomeroy thus sums up the doctrine: "A misapprehension of law by one party of which the other is aware but does not rectify, is ground for relief and a fortiori where the mistake is induced by inequitable conduct."

But it is to be noted in this connection that a person cannot be held liable for a misrepresentation of law. In *Rashdall vs. Ford* (1) the complainant advanced money to a railway company receiving a bond not legally binding. It was held that the directors could not be made liable. Said Vice-Chancellor Wood: "It seems impossible to extend the principle of relief arising out of misrepresentation to a statement of law which turns out to be incorrect." It was as much the business of the complainant as of the directors to know what the law was. This case is cited as authoritative in *Beattie vs. Ebury*, (2) and the same doctrine prevails in the American Courts. (3) It would seem as if the matter were treated as akin to the payment of money by mistake of law, from a hint dropped by Vice-Chancellor Wood in his opinion. But it seems that a misrepresentation as to powers conferred upon a corporation by a private act of Parliament is regarded as a misrepresentation of fact. (4)

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(1) L. R. 2 Eq. 749, 1866.

(2) L. R. 7 Ch. App. 802, 1872. Compare *Hirshfield vs. Railway*, L. R. 2 Q. B. D. 1, 1876.

(3) *Upton vs. Tribilcock* 91 U. S. 45, 1875.

(4) *Kitson vs. Bank*, L. R. 13 Q. B. D. 360, 1884.

## II. Mistake of an Antecedent Right.

The group of cases where the mistake of law was in respect to a right antecedent to the transaction is an important one, including as it does many of the most noted decisions long regarded as irreconcilable with the principles of equitable relief as generally understood and acted upon by the Courts. In this branch of the discussion, rapid advances have been made of late years toward a satisfactory explanation of the cases, and the adoption of a general rule may be predicted with confidence. When a person came into equity seeking to be relieved from the consequences of an agreement, the legal effect and operation of which he correctly understood, but having mistaken his precedent legal rights and interests, it did not occur to the Courts in their anxiety to follow the law, that it was only a mistake as to the *transaction itself* that called for the strict enforcement of the maxim, and that a mistake of law outside of the agreement and in regard to a pre-existing legal right was really a mistake of fact quoad the transaction in question.

In many early cases, as was shown, relief was given from the mistake, though often with the greatest hesitancy, the Courts granting the aid that common justice demanded, without discerning the logical basis of their action, seeking only for an explanation that would not compel them to offend precedent. To this class belong those cases, explained by Story (1) on the assumption that mistake of title affords ground for relief; in his own words: "A party can hardly

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(1) Eq. Jur. sec. 122.

be said to intend to part with a right or title of whose existence he is wholly ignorant." Pomeroy finds this the only general class of cases where a party is entitled to relief and makes this distinction, "the general rule, which shall be the criterion for all cases of relief from mistakes of law pure and simple." (1) It has been strenuously objected against this distinction that it opens a very wide door to relief, and it is true that, as Sir George Jessel, M. R., said: "There is not a single fact connected with personal status that does not more or less involve a question of law." (2) But the door has always been open to mistakes of fact, and if it can be shown that mistakes of law relative to pre-existing rights are entitled to be placed in the same category, there will be no sound reason for refusing relief, when to so refuse will place the other party in an unconscionable position of advantage. When a party seeks relief from an agreement made by mistake of this character, it may be objected that he is estopped by his conduct. But such an objection is untenable, as it does violence to the principles underlying the doctrine of equitable estoppel, which has its foundation in actual knowledge and concealment.

In the English Courts, the trend of the decisions has been steadily in favor of an application of the rule consonant with the principles stated above. An indication of this will be found in the case of *Reynell vs. Sprye*, (3) where a bill was filed to set aside a deed, alleged to have been procured by fraud. Vice-

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(1) Pomeroy Eq. Jurisp. Vol. 2, sec. 849.

(2) *Eaglesfield vs. Londonderry*, L. R. 4 Ch. Div. 693, 1876.

(3) 8 Hare 255, 1849.



Chancellor Shadwell, in rendering his decree, said: "I cannot but think that upon the pleadings the plaintiff might have avoided the conveyance upon the ground of ignorance as to his rights, and this ground of relief would not be inconsistent with the supposition that Sprye did not say anything which he knew to be false." He then referred to the property rights of the plaintiff, and went on to say that, if the parties are ignorant of the facts or erroneously assume that they know their rights, the Court will relieve against such a transaction. (1) In *Stone vs. Godfrey* (2) Lord Justice Turner intimated that the Court had power to relieve against mistakes of law as well as of fact. Here the plaintiff had mistaken his right to curtesy, but, on other grounds, his case did not succeed. The opinion of Turner, L. J., however, is clear; and is thus referred to by Mellish, L. J., in *Rogers vs. Ingham*: (3) "I think that no doubt, as was said by Lord Justice Turner, 'this Court has power, as I have no doubt it has, to relieve against mistakes of law as well as mistakes of fact.'"

And the same view is expressed by Lord Hatherly: "A question has sometimes arisen how far this Court can interfere to rectify a mistake of law. But having regard to all the authorities, and especially to *Stone vs. Godfrey*, I have no doubt of the jurisdiction." (4)

In one case only is this doctrine denied: *Marshall vs. Collett*. (5) There a bill was filed by a widow to

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(1) *Denys vs. Shuckburgh*, 4 Y. & C. 42, 1840.

(2) 5 De. G. M. & G. 76, 1854.

(3) L. R. 3 Ch. D. 351, 1876.

(4) *In re Saxon Life Assurance Society*, 2 J. & H. 408, 412, 1862.

(5) 1 Y. & C. 232, 1835.

set aside a sale of bank annuities, on the ground that she had mistaken her rights thereto under her deceased husband's will. Lord Abinger, C. B., considered, first, that as a matter of fact she was not entitled, and secondly, that "when parties act without fraud on a bona fide apprehension of their interests, it is not because it was afterwards discovered that these interests are differently modified, that therefore the purchase is to be considered unavailing." This language demonstrates that the Lord Chief Baron entertained a different opinion from the prevailing one; and he seems to have been convinced of the necessity of maintaining the estoppel, the plaintiff having become a party to various instruments dealing with the stock and the defendant to the suit being a bona fide purchaser for value. Although counsel have seldom failed to bring this opinion to the notice of the Courts, the dictum of Lord Abinger has had little effect upon subsequent decisions. *Boughton vs. Hutt*, on the other hand, is usually regarded as an excellent illustration of the true principle. (1) The heir-at-law of a deceased stockholder in a land company, under the erroneous impression that the stock had passed to him by inheritance (it really was personalty by provision of the deed of settlement), signed a bond of indemnity with other stockholders to trustees to assist the company through financial difficulties. The bond was directed to be cancelled by Vice-Chancellor Stuart, and his decree was affirmed by the Court of Appeals in Chancery; it being considered that the plaintiff had acted under the influence of mistake of law and of fact. As was said by

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(1) 3 De. G. & J. 501, 1858.

Lord Justice Turner in the Appellate Court, neither party intended the plaintiff to be bound unless he was a stockholder. It was urged by counsel that the mistake of law could not be relieved, but the Court thought otherwise, although it is to be remembered they did not directly acknowledge that this *was* a mistake of law. It is evident, however, that the plaintiff was mistaken merely as to his legal interest, believing that the shares of stock were in the nature of realty.

The most notable case, without a doubt, that has come before the English Courts during this century, is *Cooper vs. Phibbs*, (1) heard in the House of Lords on appeal from a decree of the Lord Chancellor of Ireland. (2) The petitioner had leased from his cousins-german a fishery, which was supposed by both parties to have vested in the last tenant, in fee simple, when in reality it was part of an entailed estate which devolved upon the plaintiff at his uncle's death. Both parties were misled by the wording of a private Act of Parliament relative to the improvement of the fishery. The petition was dismissed in Ireland upon this finding of facts. But the Lord Chancellor was far from denying the right of a Court of Equity to relieve against mistake of law. On the contrary, his language is most pronounced in affirmance of the jurisdiction. "No doubt," he said, "a mistake of law could be corrected in a Court of Equity or of Law. Where money has been paid or a conveyance executed, in ignorance of a point of law relief may be granted." He goes on to say:

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(1) L. R. 2 Eng. & Ir. App. 149, 1867.

(2) 17 Irish Ch. Rep. 73.

"It is well settled that neither Court will relieve when it is against good conscience that the party should be freed from the consequences of his error. But if it would be against good conscience that the party, in whose favor the mistake was made, should reap the benefits, the Court will prevent any prejudice to the interest of the person making the mistake."

This sensible view, which makes the "conscientious position" of the contestants, the criterion for the granting or refusing of relief, was not discussed in the House of Lords. The finding of facts was adverse to that of the Court below, so that a case of mistake of law was fairly presented. Lord Cranworth, while approving of *Bingham vs. Bingham*, preferred to put this case on the ground of misrepresentation. It is the opinion of Lord Westbury that has made the decision famous. Having reached the conclusion that this was a case of pure mistake, he finds no doubt in the rule of a Court of Equity: "It is said *ignorantia juris non excusat*, but in that maxim the word *juris* is used in the sense denoting general law, the ordinary law of the country. But when the word *juris* is used in the sense of denoting a private right, that maxim has no application."

It is just possible that Lord Westbury did not intend his exception to extend beyond cases such as the one considered, and that by mistake of private right, he meant only those arising out of private Acts of Parliament, charters of incorporation, (1) or deeds of settlement. (2) But it is usual to give his words a much

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(1) *King vs. Doolittle*, 1 Head. (Tenn.) 77, 1858.

(2) *Houghton vs. Butt*, *supra*.

wider significance and to include within his exception all cases of individual rights as distinguished from purely public law. It is questioned whether the proposition, that mistake of private law can be relieved against simply on the ground that it is a mistake of private law, can be supported; on principle, certainly there is no equitable ground for the distinction. But such wide generalizations are not wholly fair to Lord Westbury. The facts present a typical case of mistake of law, in regard to a right pre-existing and external to the transaction; a view supported by the language of his Lordship: "Private right of ownership is a matter of fact; it may be the result also of matter of law, but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that the agreement is liable to be set aside as having proceeded upon a common mistake." The mistake of ownership may, as is said, arise from a mistake of fact, but if it arises from a mistake of law, no legal phrasing can make it anything else than a mistake of law. The issue can only be met by a candid acknowledgment that the mistake of a legal right precedent to the agreement is entitled to the same consideration as a mistake of fact, and is within the corrective jurisdiction of a Court of Equity. This it is thought, was the true result of *Cooper vs. Phibbs*, and not *necessarily* the broad dictum that has met both with approval and animadversion. The case of *Beauchamp vs. Winn*, (1) is important because Lord Chelmsford who delivered the opinion had recently given judgment in *Midland*

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(1) L. R., 6 Eng. & Ir. App. 223, 1873.

*Railway vs. Johnson*, (1) in favor of the strict application of the maxim. The bill was filed to set aside a contract for the exchange of lands. The defendant maintained that the mistake, if any, was of law, and Lord Chelmsford was confronted with his previous decision. His reply was that the peculiarity of this case was that the ignorance was of a matter of law arising upon the doubtful construction of a grant. This, he held, was very different from ignorance of a well-known rule. Referring no doubt to the cases of *Bingham vs. Bingham*, *Cooper vs. Phibbs*, and others cited in the argument, he said: "There are many cases to be found in which equity upon a mere mistake of law without the admixture of other circumstances has given relief to a party, who has dealt with his property under the influence of such a mistake." There was no mistake as to the character or legal effect of the agreement, and the distinction is clearly pointed out, his Lordship saying, "I have come to the conclusion that by showing the Earl had mistaken his right to the east common, and that he was, in law, the owner of the soil, instead of having merely a right over the surface, there would have been nothing to prevent his claim to have the agreement set aside being entertained." No better illustration of the restricted application of the maxim could be given, than a contrast of the decisions in *Beauchamp vs. Winn* and *Railway vs. Johnson*.

*Cooper vs. Phibbs* is directly referred to in *Jones vs. Clifford* (2) before Vice-Chancellor Hall. The bill was to enforce the specific performance of a con-

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(1) 6 H. L. C. 798, 1858.

(2) L. R. 3 Ch. D. 779, 1876.

tract for the sale of lands. The defendant had accepted the title of the plaintiff, but before the purchase was completed it was discovered that the plaintiff had but a leasehold interest with reversion to the defendant. Specific performance was refused,—the Court making some interesting observations upon *Bingham vs. Bingham*, as interpreted by Lord St. Leonards. Lord Westbury's opinion in *Cooper vs. Phibbs* is quoted at length with the following remark: "It appears to me that the principle is thus rightly laid down by Lord Westbury, and that it applies to the case of an existing contract in a case where the Court is asked to make a decree for specific performance."

These cases have been cited with perhaps too great fullness, but it is not sufficiently realized in the American Courts, that so far from opposing a liberal view, the English Chancellors are most anxious to afford relief where the facts and circumstances call for the interference of a Court of Equity. We may certainly expect that the English Courts will not retreat from the position they have taken. A recent English writer goes even so far as to cite *Cooper vs. Phibbs* as the leading modern case on *mistake of fact*. (1)

In the United States, cases of mistake of a pre-existing right have been before the Courts on numerous occasions, and there is a lack of uniformity, both in the final results and in the ratio decidendi. It will be found, it is believed, that, in the best considered cases, relief has been granted; indeed the Courts have shown a greater readiness to deal leniently with

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(1) Brett's Modern Leading Cases in Equity, 1891.

such errors than one would have reason to expect, from the lack of confidence often displayed in stating the principles.

The logic of the reasoning which denies the application of the maxim to cases of mistakes of rights, precedent to the agreement, has been accepted but slowly. The timidity, however, is now rapidly disappearing.

Lamont vs. Bowly, (1) a decision of the Supreme Court of Maryland, is one of the early discussions of this subject. A bill was filed to stay proceedings in an ejectment. The plaintiff in the ejectment had been privy to the sale of the land, not knowing that the effect of a devise was to give him the land independent of the happening of a contingency. The ejectment was brought as soon as he discovered his title, a state of facts strongly resembling those in *Stoors vs. Barker*. The case was ably argued, on the one side, by Taney, and, on the other, by Wirt. The argument that Bowly was *estopped* from impeaching the sale did not meet with approval, the Court holding that "the question was to be decided on principles of equity and conscience, which can never inflict a punishment upon innocence or decree a forfeiture where there has been no fault," estoppel proceeding on the principle of a fraudulent concealment of rights. "It is not intended to say that the plea *ignorantia juris* would be available in all instances," remarked Stephen, J. "Some legal principles are so plain that it would be doing violence to probability to impute ignorance, but where the legal principle is confessedly doubtful, and one about which ignorance may

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(1) 6 H. & J. 500, 1825.



well be supposed to exist, a person acting upon a misapprehension of law in such a case shall not forfeit any of his rights by reason of such mistake." Language very similar to that used by Lord Chelmsford fifty years later. (1)

In *Wintermute vs. Snyder* (2) the defendants had joined in the assignment of a legacy under an undoubted mistake as to their existing rights. The Chancellor of New Jersey nevertheless adhered to the maxim, relying chiefly on *Hunt vs. Rousmanier* (3) and *Lyon vs. Richmond*. (4) The conclusion there reached cannot be reconciled with the rule as now understood. In anomalous decisions such as this, it will usually be found that the Court has failed to properly distinguish between the very different groups of cases of mistakes of law, and has feared to add to the exceptions to the maxim. In *Underwood vs. Brockman*, (5) decided in the same year, it was said by the Court that where the only consideration of a contract was a mistake as to the legal rights or obligations of the parties, and where there had been no compromise of doubtful claims, the agreement might be avoided on the ground of clear mistake of law and total want of consideration or mutuality.

The proper result was obtained in *Freeman vs. Curtis*, (6) a case involving an interesting state of facts. The bill was filed to compel a re-conveyance of property obtained from the plaintiffs, who had been

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(1) *Beauchamp vs. Winn*, *supra*.

(2) 2 *Green's Ch.* 498, 1836.

(3) 8 *Wheat* 178, 1823.

(4) 2 *Johns. Ch.* 51, 1816.

(5) 4 *Dana (Kty.)* 309, 1836.

(6) 51 *Me.* 140, 1862.

ignorant of their rights as next of kin. Counsel for defendant urged that plaintiffs must have known their relationship to decedent. But the Court, after pointing out that relief for mistake of law was exceptional, held that the plaintiffs were ignorant of the law relating to the descent and distribution of estates, and this ignorance involved them in a mistake of fact as to who were the heirs of the intestate. And where the mistake is one of law and fact, though the latter is the result of the former, relief will be granted. The decree directing a re-conveyance was in accord with modern equitable rules. But the language of the Court displays some anxiety to avoid a candid acknowledgment that equity will relieve a mistake of law.

A year prior to the last considered case the subject was before the Supreme Court of Pennsylvania in *Peters vs. Florence*. (1) This Court has leaned strongly in favor of the general application of the maxim, but it can be shown that *Peters vs. Florence* is not antagonistic to the views believed to be correct. A husband, sole devisee and executor by his deceased wife's will, paid a mortgage on his wife's real estate, without taking an assignment to himself. In an action of ejectment after his decease, it was held that the wife had no power to will this property, but Chief Justice Lowrie in his charge to the jury said that if the husband paid the mortgage on the supposition that he was owner, or that as executor he was bound to pay it, the amount must be paid his heirs just as if the mortgage had been assigned. This charge was held erroneous. "We do not propose," said Justice

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(1) 38 Pa. 194, 1861.

Strong, "to assert either that equity will or will not relieve against an act done in *mistake of title* growing out of ignorance of the law. Such a decision would require a long and thorough examination of past adjudications, and this case does not call for it. Whatever may be said in regard to his mistake of ownership, whether that be regarded as a mistake of fact or of law, and whether such mistake can be relieved against or not, it is clear that an erroneous supposition that he was liable to pay as the executor of his deceased wife, was nothing but a misapprehension of law." Justice Strong's distinction is accurate, leaving the question open as to whether a mistake of pre-existing right or title could be relieved. The charge at nisi prius was, therefore, certainly wrong in one particular at least. The case of misapprehension of law by an executor in the course of his duty belongs in that group where the mistake is in the transaction itself; the decision in *Peters vs. Florence* goes no further.

In *Gross vs. Lieber* (1) the question undetermined in *Peters vs. Florence* came before the Court. The action was on a bond. Evidence to prove that defendants had given the bond for a debt of the cestui que trust under the mistaken belief that, as administrators of deceased trustee, they had become trustees in his place was rejected in the trial court. While affirming *Rankin vs. Mortimer* (2) the Supreme Court thought that the offer did not come within the principle of that case, but that the mistake was of fact superinduced by mistake of law

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(1) 47 Pa. 520, 1864.

(2) 7 Watts 72, 1838.

as to the capacity and duty of the defendants and could be relieved. A strong resemblance was found to the case of *Heacock vs. Fly*. (1) "It is clear," said the Court, "that that was a mistake of law as to a woman's power to bind herself by mortgage, but it led to a mistake of her capacity as that of a feme sole and caused a conveyance to be made which otherwise would not have been made." *Gross vs. Lieber* plainly recognizes the rule that equity will relieve against a transaction entered into under a mistake of pre-existing rights or liabilities, such mistake not being within the mischief guarded against by the maxim.

*Zollman vs. Moore* (2) is a Virginia decision that dissatisfies Mr. Bigelow. Land was sold by decree of the Court and one-third of the proceeds paid to the widow as dower. Subsequently she discovered that she was entitled to the whole by right of survivorship, and filed a bill to set aside the sale. The Court, without regard to the decision in *Irick vs. Fulton* (3) held that ignorance of the law furnished no ground for setting aside the solemn contracts of parties. It was attempted also to show that the purchaser occupied a superior position as having paid a bona fide consideration. The case was admittedly a hard one, the widow having acted in entire ignorance of her rights. In the opinion no effort was made to distinguish between mistakes of prior right, legal effect or even money paid. An unquestioning reliance on the maxim is displayed.

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(1) 14 Pa. 540, 1850.

(2) 21 Gratt, 313, 1871.

(3) 3 Gratt, 193, 1846.

In view of the later decisions, this case has lost much of its weight as an authority. In *Brown vs. Rice* (1) the Court had so far altered its position as to accept the view of Kerr in his chapter on mistake. But a better opportunity for a decision was afforded by *Webb vs. The City Council of Alexandria*. (2) The appellant had purchased bonds of the city at a sale by an United States Marshal which subsequently proved illegal. The city had exchanged these bonds for new ones, and now sued for the return of the new bonds. Kerr on mistake was again relied upon as an answer to the claim of the appellant that *ignorantia juris non excusat*, and the dictum of Lord Westbury is approved. It is satisfactory to note that the position assumed in *Zollman vs. Moore* has been practically abandoned in this decision.

The ideal illustration of mistake of a pre-existing right according to Pomeroy is the case of *Blakeman vs. Blakeman*. (3) A right of way had become extinguished by the purchase of the servient by the owner of the dominant tenement. Subsequently the dominant tenement was sold with "privileges and appurtenances" both parties believing that the right of way passed with the fee. The bill prayed for reformation and the petition was granted. "The respondent sold and the petitioner bought" said Chief Justice Butler, "an extinct thing, both ignorant that as a matter of law the object could not exist. There was no mistake as to the legal effect of the deed, nor was there a mistake as to the nature and operation

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(1) 26 Gratt, 470, 1875.

(2) 33 Gratt, 168, 1880.

(3) 39 Conn. 320, 1872.

of any principle of law upon the contract, there was superadded to the mistake of fact ignorance of a principle of law which if known and contemplated would have prevented the mistake." The mistake was absolutely and entirely the result of ignorance of the legal extinction of the right of way. The Court clearly recognized the distinction between such a case and mistake *in* the contract or in regard to its *effect*.

The Courts of New Jersey have had two opportunities to develop the law of that State in conformity with the modern view. In *Macknet vs. Macknet*, (1) it was found that a widow had elected against the will not only under a mistake as to the amount of income, but also as to her legal rights, owing to erroneous advice of counsel. The Court citing Lord Westbury's opinion, took the position that this was really a case of mistake of fact, the misapprehension of rights under a deed having been treated as a mistake of fact, (2) and relief was accordingly granted. This is contrary to *Light vs. Light* (3) where it was said that an election was binding on a widow if she knew the facts, though she did not understand her legal rights, but is more in accord with the views of the Connecticut Courts. (4)

The question was again considered in *Freiknecht vs. Meyer*, (5) where it was decided that the purchaser at an illegal sheriff's sale was to be compensated for improvements, the complainant maintaining that the purchaser was chargeable with knowledge of the law.

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(1) 29 N. J. p. 54, 1878.

(2) *Denys vs. Shuckburgh*, *supra*.

(3) 21 Pa. 407, 1853.

(4) *Evans' Appeal*, 51 Conn. 436, 1883.

(5) 8 N. J. L. J. 167, 1885.

The Court was not prepared to agree with Lord Westbury that in all cases the ownership of property is to be classed among matters of fact, or that the maxim denotes only the general law, but thought "it would be found to accord with the decisions that whenever the party jeopardized can be relieved without substantial injustice to the other side, there equity will afford redress, especially if the party to be benefited by the mistake invokes the aid of equity to put him in a position where the mistake will become advantageous to him." This view is conservative and directed to meet the requirements of the case itself. A note of warning is sounded against the broad acceptance of Lord Westbury's view; as has been shown above the distinction between public law and private right can hardly be regarded as forming a safe line of cleavage, unless properly restricted. The disposition to enounce Lord Westbury's dictum without qualification is not to be encouraged.

The Supreme Court of Illinois, while recognizing the importance of the maxim, has declared that where a person has acted in respect to his property under a misapprehension of his existing legal right, he must be relieved. (1) The exceptions to the rule laid down in the principal case in this jurisdiction (2) are admitted to comprise a very large class.

The case of *Hamblin vs. Bishop* (3) in the United States Circuit Court presents the opposite view of the question. The complainant conveyed her share of an intestate's estate to the respondent, believing that she

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(1) *Bonney vs. Stroughton*, 122 Ill. 536, 1887.

(2) *Goltra vs. Sanasack*, 53 Ill. 456, 1870.

(3) 41 Fed. Rep. 74, 1889. See *Good vs. Herr*, 7 W & S. 252, 1844.

was entitled to a share as a cousin only, both parties being ignorant that she was entitled to an additional share as aunt of the half-blood. The bill prayed for a re-conveyance. "Various nice distinctions," said Judge Wales, "and refined reasonings have been employed to relax the stringency of the rule, and respectable authority has been referred to both in this country and in England to sustain the theory that the present case is one of mixed law and fact." While *Freeman vs. Curtis* might be considered sound, the parties to this case, he thought, could not be placed in statu quo. The bill was dismissed, although it appeared "that justice and equity required a redistribution of the proceeds of the sale among the heirs." This decision may have been warranted by the difficulty of re-adjusting the rights of the various parties; but the Court clearly failed to distinguish between the classes of cases and firmly relied on the maxim. "It will not be necessary or useful to review the authorities, *Hunt vs. Rousmanier* set the question finally at rest." In the face of such dicta, we may look in vain for a discussion from a modern standpoint.

*Gerdine vs. Menage*, (1) decided in the same year in Minnesota, presents the better-considered doctrine with great clearness. The defendant, while conceding the invalidity of his title, alleged that on faith of it he had discharged mortgages. The Court allowed him to be subrogated to the rights of the prior holders. (2) The mistake, they held, was a natural one for a layman and to be distinguished

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(1) 41 Minn. 417, 1889.

(2) Compare *Bentley vs. Wittenmore*, 18 N. J. Eq. 366, 1867.



from mistake or ignorance of the general law or of the legal effect of an instrument or transaction. "Where a person erroneously assumes that he knows his rights and deals with his property accordingly, equity may interfere." The case is virtually an approval of *Blakeman vs. Blakeman*.

By way of summary it may be said that, except in a few instances where the Courts have been overawed by the seeming authority of the maxim, the general rule, both in England and America, has been to afford relief in cases of mistake of pre-existing rights, with due regard to the interests of third parties. Lord Westbury's dictum has contributed to this result, the Courts taking a liberal view as to what constitutes a "private right." Where this rule is only the effect of an application of the true principle to a single class of cases, its importance is not to be underestimated. Courts may differ in unimportant particulars so long as the substantial ends of justice are attained.

A distinction was made in South Carolina between *mistake* of law and *ignorance* of law. No such doctrine will be found in the first cases: *Londes vs. Chisholm*, (1) where relief was given upon the broad principle that mistake of law was as capable of relief as mistake of fact, citing Chief Justice Marshall. This case was heard before *Hunt vs. Rousmanier* came up for the second and final decision. But the question was once more before the Court in *Lawrence vs. Baubein*. (2) A testator devised real estate to an alien, who was advised

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(1) 2 McCord, 465, 1827.

(2) 2 Bailey S. C. Law, 623, 1831.

that he could not take, and thereupon purchased the rights of the heir-at-law, giving his bond in payment. In fact, the obligee had no title, and the alien's title was good until the estate was formally escheated. This mistake was set up as a defence to an action on the bond. The case was debated at great length, and Justice Johnson's opinion is an able summary of the arguments presented. Considered with reference to the rules of morality, he holds, there could be no difference of opinion. But in the statement that equity will not relieve against a mistake of law, "the difficulty and confusion arises from confounding ignorance and mistake. The former is passive and does not presume to reason unless we are permitted to dive into the secret recesses of the heart, but the latter presumes to know, and supplies palpable evidence of its existence." The conclusion is, that contracts founded on a plain mistake of law from a known state of facts, and capable of proof, ought not to be enforced. Directions were given for the framing of an issue to determine whether the plaintiff was ignorant or mistaken. This ruling was followed on the equity side of the same Court (1) and has been approved on several occasions in other States, particularly by Senator Paige in *Champlin vs. Latyn*. (2)

The consensus of opinion is to regard the distinction as more ingenious than sound. As Mr. Bigelow justly observes: "The words mistake and ignorance have been used indiscriminately, but if

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(1) *Mortimer vs. Pritchard*, 1 Bailey, Ch. 505, 1831; *Hopkyns vs. Mazyck*, 1 Hills, Eq. 242, 1833.

(2) 18 Wend. 407, 1837; *Hall vs. Reed*, 2 Barb. Ch. Rep. 505, 1848.

properly employed, it is in cases of *ignorance* that relief is given, for mistake implies some notice of the law." From a practical point of view, it is not clear that mistake of law is any more susceptible of proof than ignorance. In *Gwynn vs. Hamilton* (1) the Court observed "that this distinction has been generally repudiated as resting upon a mere imaginary difference, or as too subtle and refined for practical application." It is suggested that these cases could have been more easily disposed of by an application of the rule by which mistakes of pre-existing rights are relieved. The mistake in *Lawrence vs. Baubein* was a mistake as to legal rights precedent to the transaction. In neither of the New York cases was the statement of the doctrine necessary to the decision. In the United States Court of Claims (2) the distinction between ignorance and mistake of law was thought too refined for everyday business life. "The difficulty would be to ascertain with any degree of certainty whether the error arose from ignorance or misconception, and the very misinterpretation alleged might be the ignorance of law in general or the rules of its interpretation and application." The Supreme Court of South Carolina has shown a strong inclination to retreat from its former position. In *Cunningham vs. Cunningham* (3) it was said: "In this State the distinction has been sharply drawn between ignorance and mistake of law, the principal reason given being that mistake of law could be proved and ignorance could not.

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(1) 29 Ala. 233, 1856.

(2) *Schlesinger vs. U. S.*, 1 Ct. of Cl. 25, 1863.

(3) 20 S. C. 317, 1883; also *Keit vs. Andrews*, 4 Rich. Eq. 349, 1852.

As parties can now testify in their own behalf, it may be doubtful if this reason can be longer sufficient to justify the distinction." The South Carolina doctrine is an interesting divergence from the common line of argument, but it is not an important factor in the problem of arranging the authorities.

### III. Mistake of Legal Effect.

That mistake of law in regard to the legal effect of an agreement afforded no ground for equitable relief, has been stated by some writers as the accepted rule in Courts of Equity. Where a person enters into a transaction with full knowledge of the facts, because that transaction has a subsequent legal effect un contemplated by the parties at the time of agreement, does not give a Chancellor the right to interfere. No reason will be found for this rule that is different or stronger than those upon which the maxim is usually enforced. Says Professor Pomeroy (1): "The underlying principle is that equity will not interfere for the purpose of carrying out an intention which the parties did not have when they entered into the transaction, but which they might or even would have had if they had been more correctly informed as to the law." If "intention" means the *expressed intention*, this reasoning is correct. But if "intention" refers to the end that the parties were actually seeking to attain, and the legal effect of the agreement is contrary to that true intention, in declining to interfere, the Courts will allow one party to

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(1) Eq. Jur., Vol. II., sec. 843.

obtain an advantage that is not equitable. If it is once conceded that there are cases to which the maxim does not apply, it becomes difficult to perceive why this mistake is not entitled to recognition as an exception equally with the class previously discussed in every instance where a clear case in conscience is presented, and where vested rights are not disturbed.

The English cases upon this subject are not numerous. In *Croome vs. Ledyard*, (1) Lord Brougham observed "That the purpose for which the evidence was tendered on the part of the defendant was not to enforce a collateral stipulation, but to show that the transaction was conducted on the basis of an exchange which, if true, was totally at variance with the plain import of the instrument, and to admit such evidence would be dangerous." On the other hand, in *Lloyd vs. Bennet*, (2) at nisi prius, Sir John T. Coleridge said, that if a man was induced to execute an instrument, supposing it to operate one way, whereas it really operated in another, such an instrument would be invalid.

The first important decision was made in *Railway vs. Johnson*, (3) an appeal from a decision of the Lord Chancellor of Ireland. The plaintiff, a contractor, claimed that a sum of money should be allotted to him on the ground that, although decided in the Courts to be a fund to compensate for depreciations in the value of rolling stock, yet in his dealings with the company's engineer, both had erroneously acted under the belief that the sum was merely a

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(1) 2 M. & K. 251, 1834.

(2) 8 Car. & P. 124, 1837.

(3) 6 H. L. Ca. 798, 1858.

guarantee fund to be restored to the contractor. Lord Chelmsford declared that if a party acted upon a mistaken view of his rights under a contract, he is no more entitled to relief in equity than in law. "It is impossible to find an equity on the ground of mutual mistake, to the extent of *making a different contract* from the one agreed to by the parties. Lord Wensleydale, concurring, urged that it was not at first pretended that the contract did not express the intention of the parties, and although it might appear that the parties had a mistaken view of the nature of the contract, that would not entitle them to relief, "unless it could be shown that the contract did not represent their original intention." There is nothing in this decision from which it could be deduced, that relief would be refused in a case of clear mistake as to the legal effect of a contract, producing a result contrary to the real agreement.

The case that comes nearest to a decision of the question is *Powell vs. Smith*, (1) where a person signed a contract to lease, that conferred an option to terminate, upon the lessee but not upon the lessor. Lord Romilly did not consider this a case of mistake at all; but as an agreement entered into the legal effect of which was not known at the time. It was a question upon the misconstruction of an agreement consented to by everybody concerned. Although regarded as an authority for the rule, it is suggested that the case does not belong in this class, the error of law concerning the very agreement itself, and not its subsequent legal effect. All, therefore, that can be said of the authorities is that the cases have not

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(1) L. R. 14 Eq. 85, 1872.

called for the same full discussion that has been necessary in the American Courts, but that the inclination is against granting relief. (1)

That this phase of the subject is so constantly referred to in the American Courts is due no doubt to the wide-spread notoriety attained by the case of *Hunt vs. Rousmanier* in the Supreme Court of the United States, (2) a decision generally received as a leading authority and one never disregarded in a consideration of the rule. *Rousmanier*, as security for a loan, offered *Hunt* either a mortgage or bill of sale of his interest in a ship. For the convenience of the parties and by advice of counsel, a power of attorney to make a bill of sale was given. The consequence of this was that on *Rousmanier's* death the power became void, a result not contemplated at the time of the transaction. The aid of equity was invoked to compel the executor to join in a sale of the ship on the ground that there had been a mistake of law, the intention of the parties having been to give an indefeasible lien. There was a demurrer to the bill which the Court was unwilling to sustain. Said Chief Justice Marshall: "Although we do not find the naked principle that relief may be granted on account of ignorance of the law asserted in the books, we find no case in which it has been decided that a plain and acknowledged mistake of law is beyond the reach of a Court of Equity."

Five years later, the case was before the Court on bill and answer. The personnel of the Bench was almost unchanged, but Webster appeared for the

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(1) *Hart vs. Hart*, L. R. 18 Ch. D. 670, p. 674, 1881.

(2) 8 *Wheaton*, 174, 1 *Peters* 1, 3 *Mason*, 294, 2 *Mason*, 342, 1823, 1828.

appellant and Wirt for the appellee. The Court came to a definite conclusion, holding that mistake of this character is not a ground for reforming a deed, the exceptions to the maxim being few in number and peculiar in their character. The language of Justice Washington is cautious: "It is not the intention of the Court in the case now under consideration to lay it down that there may not be cases in which a Court of Equity will relieve against a plain mistake arising from ignorance of law? But we mean to say that where the parties upon deliberation and advice reject one species of security and agree to select another under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension and insufficiency of such security, in consequence of a subsequent event not foreseen or perhaps thought of, direct a new security of a different character to be given or decree that to be done which the parties supposed would have been effected by the instrument which was finally agreed upon."

This case has been considered on the one hand a broad affirmance of the maxim, (1) and on the other hand as a relaxation of the rule. (2) A difference of opinion that has arisen from a failure to note that the case was twice before the Court and that while the first occasion might be called a drawn battle, the second resulted in a moderate victory for the maxim. When, however, the facts are examined, the weakness of the plaintiff's case

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(1) *Wintermute vs. Snyder*, *supra*.

(2) *Moser vs. Libengruth*, 2 *Rawle*, 427, 1830.



is apparent, and it is certainly strange that so little stress has been laid on this weakness by commentators. The estate was insolvent and the true difficulty lay in attempting to maintain the bill against the creditors of the insolvent estate. As it was clearly put by Judge Story, in the Circuit Court: (1) "If mistake of law is to be corrected, or a parol agreement for a lien enforced against the party, it is not to be against other innocent creditors standing upon equal meritorious considerations. My opinion proceeds upon two grounds: first, he (the plaintiff) has no lien; and second, no equity to have such a lien created against other creditors of an insolvent estate." The necessity for protecting the rights of the creditors is so obvious that any other decision would have worked injustice. At the same time, the decision is deprived of some of its influence as an authority, since it is by no means certain that the result would have been the same had the question arisen between the original parties only to the agreement.

But whatever may be said to distinguish this case from other decisions, there can be no doubt as to the meaning of the words of Justice Washington; and as a final result it is usually said, that the case deliberately decided that where the agreement embodies the idea that the parties had in concluding it, even if they would not have so embodied their intention had they understood the legal consequences, a Court of Equity will not interfere; in other words equity will not make a new contract, to effect that which the parties supposed would be effected by the instrument.

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(1) 3 *Mason* at p. 305.

It is said that this doctrine is settled with unanimity, but such a statement must be tested by an examination of the cases. Decisions are frequently cited as following *Hunt vs. Rousmanier* that do not present an analogous state of facts. For example, it will be found in several instances where the error was called a mistake of legal effect, that the parties acted on an erroneous construction of an instrument; such cases do not properly belong in this group. The fact is, that the rule that mistake of legal effect does not afford relief has been indiscriminately applied to several distinct kinds of error. The two, however, that most commonly occur are, *first*, where the instrument fails to express the true agreement of the parties; and *second*, where the instrument expresses the agreement of the parties, but has an effect contrary to their primary intention. In the cases where relief has been refused this distinction has been totally disregarded; and it becomes important in considering the cases where relief has not been refused.

An early adoption of the rule in *Hunt vs. Rousmanier* will be found in *Wheaton vs. Wheaton*, (1) where the Court of Errors of Connecticut intimated that the doctrines laid down by Chief Justice Marshall were greatly shaken by the subsequent opinion of Justice Washington and would not warrant a departure from the maxim, although the promissory note signed bore no resemblance to that agreed upon by the parties. The error was gross, and little sympathy for the plaintiff was expressed by the Court. But the position of the Connecticut Court

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(1) 9 Conn. 96, 1831.

has been modified in subsequent decisions. (1) *Rankin vs. Mortimer*, regarded as the leading authority in Pennsylvania, was decided ten years later. (2) The mistake alleged was in regard to the legal effect of a deed. "The presumption is" said the Court, "that every man is acquainted with his own rights, provided he has reasonable opportunity to know them." The judgment in fact, is an almost verbal adoption of the language of Story's "Equity Jurisprudence."

The case of *Broadwell vs. Broadwell* (3) contains an interesting discussion, approving and applying the rule. "Whenever the Courts," it was said, "shall establish it as a general rule that they will go out of an instrument and inquire what construction each or both of the parties put upon it at the time it was made, they will be starting on a path which will lead to interminable labyrinths and will present an inducement to perjury that will be alarming in its consequences." The Court admits that the same objection might be urged as to mistake of fact, but insists that, "the danger is nothing to what it would be in relieving against mistake of law."

It is suggested that this danger, so alarming to the Illinois Court, could be met by the requirement of the clearest and most convincing proof. A similar conclusion was reached in *Goltra vs. Sanasack*, (4) without reference to authority.

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(1) *Steedwell vs. Anderson*, *infra*.

(2) 7 Watts, 372. 1838.

(3) 1 Gill, (Ill.) 599, 1844. See *Oswald vs. Sproule*, 16 Bradw. 368, 1885.

(4) 58 Ill. 456, 1870.

The subject was also discussed in Vermont, and at first it would seem the Court favored the granting of relief. In *Mower vs. Hutchinson*, (1) the Court restrained the operation of a deed beyond what the parties intended by it, and in *Beardsley vs. Knight*, (2) it was said, "In relation to the subject matter of conveyances, it makes no difference whether indeed the parties failed of executing such an instrument as they intended, or mistook in reference to the operation of the instrument; if it be clearly shown that the parties did not effect what they intended to do, a Court of Chancery will perfect their intention." These cases were relied on by the complainant in *Proctor vs. Thrall*. (3) The grantee of a mortgagor, on selling the property, procured the mortgagee to execute a bond to the purchaser conditioned to save him harmless from all damage consequent to any incumbrance on the land. The intention was to discharge the last purchaser only from liability, but the effect was to release the land entirely from the incumbrance. It was undoubtedly true, the Court held, that Chancery interfered for the purpose of correcting agreements, where the legal effect of the contract was entirely different from what the parties intended at the time it was made, but this was only in cases "where the contract might still operate in the manner and to the extent the parties intended when they made it, and its farther and different operation might be restrained." Here the different operation beyond what was intended

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(1) 9 Vt. 242, 1837.

(2) 10 Vt. 185, 1838.

(3) 22 Vt. 262, 1850.

was merely the legal effect of what they did intend, and the Court would not annul the very contract understandingly entered into by the mortgagee and acted upon by the purchaser. This avoidance of a reversal of *Mower vs. Hutchinson* was most ingenious. But the Court could have put their decision upon the ground that the rights of the bona fide purchaser were not to be disturbed.

In New York, the early influence of Chancellor Kent in favor of a strict application of the maxim has given an additional stimulus toward a full acceptance of the doctrine of *Hunt vs. Rousmanier*. In *Leavitt vs. Palmer*, (1) Judge Bronson said: "If the parties mistook the law, we cannot grant relief by making a new contract for them. *Hunt vs. Rousmanier* is directly in point." In *Garnar vs. Bird*, (2) this decision was quoted, with the remark: "Such precisely, is this case, the parties have made their contract just as they agreed to. They mistook the law, and cannot be relieved by our making a new contract for them." (3) In 1850, two cases on this subject were before the Court and were decided in conformity with the above. In *Gilbert vs. Gilbert*, (4) the testator, who had devised real estate to his wife, on exchanging the same for a farm, would have taken title in her name had not the person who drew the deeds advised that the exchange would not affect devises in the will. The Court held that the mistake of law could not be corrected. In *Arthur vs.*

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(1) 3 N. Y. 19, 1849.

(2) 57 Barb. 277, 1870.

(3) See *Stoddart vs. Hart*, 23 N. Y. 556, 1861; *Kent vs. Bank*, 29 Barb. 595, 1859.

(4) 9 Barb. 532, 1850.

Arthur, (1) the testator before his death conveyed to a devisee a portion of his property, intending the same to be in lieu of the share devised in will. A bill was filed to have this land conveyed declared to be full satisfaction of the devise, or that the conveyance be declared void. Equity, it was held, could give no relief, and reference was made to *Hunt vs. Rousmanier*, and to Chancellor Kent's decisions. In both cases, the Court was greatly influenced by the fact that it was the legal construction of a will which the parties sought to alter by parol testimony, holding that a will cannot be altered because the testator misapprehended its effect.

An early application, it was shown, was made in Maryland of the principle that mistake of a pre-existing right could be relieved. In the cases of the present class, relief has been refused. Dicta to this effect will be found in *McEllery vs. Shipley*, (2) but the question is more fully discussed in *Anderson vs. Tydings*, (3) where the Court thought that *Hunt vs. Rousmanier* was sufficient to show that the complainants to the bill were not entitled to relief. Real estate was granted to a feme covert in fee simple instead of to her separate use. After her death, creditors of her husband issued execution against his right of curtesy, and it was held that the deed could not be reformed to the prejudice of creditors, whose equity was equal and who had the advantage of law.

In *Martin vs. Hamblin*, (4) the question is briefly discussed. "If," said the Court, "the plaintiff relied

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(1) 10 Barb. 9, 1850.

(2) 2 Md. Rep. 35, 1849; *Showman vs. Miller*, 6 Md. Rep. 479, 1854.

(3) 8 Md. Rep. 427, 1855.

(4) 18 Mich. 354, 1869.

on the acreage mentioned in the deed as a guarantee, it was a mistake of the legal effect of the deed, purely a mistake of law, and no ground for relief." It will be noticed that this was not technically a mistake of legal effect, but merely an erroneous construction of an instrument, a distinction that should be most carefully observed to avoid confusion. A similar decision was made in the following year by the United States District Court in Michigan. (1) A promissory note had been given in payment for a patent right, the written agreement stating that the note should be void if the patent proved invalid. The bill in equity, however, stated that the true agreement was that the note was not to be payable until the patent was declared void. This, said the Court, was pure mistake as to the legal effect of the agreement, and must be held obligatory. The ignorance was, the Court thought, inconceivable in a person of ordinary intelligence.

Two decisions in Iowa are particularly interesting from the contrast they afford to the recent case of *Griswold vs. Hazard* (2) in the Supreme Court of the United States. In both, a bond was given for the release of attached property intended as a delivery bond, but which legally bound the obligor to pay the amount of the judgment of the Court. Although the error was clear, the Court refused relief on both occasions. In *Moorman vs. Collier*, (3) it was pointed out that the plaintiffs could not be restored to their rights against the garnishees. It is a case where

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(1) *Hoover vs. Reilly*, 2 Abbott, U. S. 471, 1870.

(2) 141 U. S. 260, 1891.

(3) 32 Iowa, 138, 1871.

some one must suffer, and the Court wisely, though with some apparent hardship, leaves it for him to suffer who committed the mistake. In *Glenn vs. Statler* (1) there was no release of garnishees to turn the scale, but it was decided, nevertheless, that the mistake of law, in supposing the legal effect of the conditions incorporated in the bond to be different from what they were, would not entitle one to have the bond reformed.

The Courts of Indiana have laid down the strict rule in a line of decisions. In *Nelson vs. Davis*, (2) a deed, conveying a life estate, when a fee simple had been intended, was sought to be reformed. "It may be supposed," said the Court, "that the parties explained their purposes to the scrivener, and he prepared such an instrument as he thought would be available in carrying them out, all parties supposing the terms sufficient. If so, if this was the way they were mistaken, it was a mere mistake of law from which no relief can be granted." (3) This is the most extreme view taken. The case belongs to the class where the instrument fails to conform to the real agreement, the tendency at present favoring relief, in such instances, as will presently be shown. In *Allen vs. Anderson*, (4) the effect of mutual conveyances was to merge a life estate contrary to the intentions of the parties, and the same strict rule was applied, meeting with approval in later decisions. (5)

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(1) 42 Iowa, 107, 1875; also, *Gerald vs. Ellery*, 45 Iowa, 322, 1876.

(2) 40 Ind. 366, 1872.

(3) *Heavenridge vs. Monday*, 49 Ind. 434, 1875.

(4) 44 Ind. 395, 1873.

(5) *Williamson vs. Hitner*, 79 Ind. 233, 1881; and *Toops vs. Snyder*, 70 Ind. 554, 1880.



The rule in *Hunt vs. Rousmanier* has been loyally upheld in the United States Courts. "Whatever rule may prevail elsewhere," said Judge Hammond, in *Allen vs. Galloway*, (1) "there can be in the Equity Courts of the United States no relief from a mistake of law," although it is admitted that a relaxation might be required by an imperative equity.

These, then, are the principal decisions that have refused relief in cases of this class, some on the express authority of the leading decision, others on the general authority of the maxim. The number of cases holding this view is to be attributed in a large measure to the influence of Story and Kent. In more than one instance, the hardship has been admitted and the existence of exceptions conceded. In examining the decisions that distinguish or disregard the rule, reference must be made again to the loose manner in which the term "legal effect" has been used, in referring both to errors as to the real character of the instrument and to errors as to its subsequent effect only. It is obvious that these classes are distinct, but the tendency at one time was to regard the first as not different from the second. Ignorance and mistake on the part of the draughtsman were thought to be the only exception recognized in *Hunt vs. Rousmanier*. This was not the main point in that case, but was simply referred to as an incontrovertible principle of equity. As it is tersely put in *Seibert vs. McAvoy*, (2) "*the construction of words is a matter of law, the insertion*

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(1) 30 Fed. Rep. 466, 1887; *Andrews vs. Coke Co.* 39 Fed. Rep. 353, 1889.

(2) 15 Ill. 106, 1853.

of words is a matter of fact." (1) Cases proceeding on this principle cannot be said to follow the rule in *Hunt vs. Rousmanier*, although they frequently go out of their way to assent to its doctrines.

It was said above that no distinction was made as to the two classes, in those cases that adhere to the strict rule. The same is generally true in those cases that disregard it. Proceeding as they do upon broad equitable principles, capable of including both groups, there is no necessity for a division. In *Bryan vs. Masterson*, (2) a covenant to pay current money of Kentucky was relieved against, on proof that the parties mutually mistook the legal effect of the words, both supposing that they meant whatever money should be *in fact* current. (3) A question not unlike the above was discussed in Ohio, (4) where it was said that *Hunt vs. Rousmanier* went far to establish the doctrine, that where the parties through a mistake and ignorance of the law execute a contract which does not carry into effect their intentions, the true contract may be enforced in Chancery. A full consideration was given to the question in *McNaughten vs. Partridge*. (5) A bond was executed on behalf of a firm by one partner, all parties believing it would bind all the members. The judge who delivered the opinion observed: "I do not know whether I am authorized by a majority of the brethren to say that a mere mistake of

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(1) *Cook vs. Husbands*, 11 Md. 492, 1854; *Mackenzie vs. Mackenzie*, 52 Vt. 271, 1880.

(2) 4 J. J. Marsh, 225, 1830.

(3) Cf. *Fishback vs. Woodford*, 1 J. J. Marsh, 84, 1829; also, *Wood vs. Price*, 46 Ill. 439, 1868.

(4) *Edwards vs. Norris*, 1 Ohio 531, 1823.

(5) 11 Ohio, 223, 1842.

law may be corrected, but I am authorized to say that relief might be granted in the case at bar. It (the bond) contained every stipulation the parties supposed it contained, but they were mistaken in its legal effect." The Court particularly criticised Story's deductions. In a later case in the same volume; (1) Wood, J. declared that it could not be denied that there the mistake was as to the legal operation of the instrument. He contrasts the views of Chief Justice Marshall and Chancellor Kent, and decides that where different rules of action are laid down by different tribunals, that view should be maintained, most conformable to reason and the ends of justice. "In our view these require that the presumption that every man knows the law, should be permitted to be rebutted by proof, and relief granted against a mistake of law." (2) A peculiar decision was rendered in Arkansas, (3) where the State attempted to enforce the payment of a bond given in payment for land purchased under a misconstruction by the defendant and the State officials of an Act of Assembly. The authorities were fully discussed and the Court seems to have been greatly in doubt, but a distinction was finally drawn between ignorance of the existence and ignorance of the effect of the law. This case was treated as a clear misapprehension of the legal effect of the contract by which the State had lost nothing, and were now endeavoring to enforce an unconscionable agreement, and relief was granted accordingly. (4)

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(1) *Evants vs. Strode*, 11 Ohio, 480, 1842.

(2) *Clayton vs. Freet*, 10 Ohio St. 544, 1860.

(3) *State vs. Paup.* 13 Ark. 129, 1842.

(4) Cf. *Rector vs. Collins*, 46 Ark. 167, 1885.

In *Lucas vs. Lucas*, (1) a case had been settled by taking an agreed verdict. Afterward the plaintiff moved to set it aside on the ground that its legal effect had been mistaken. The principle, it was said, of granting relief from a mistake as to the legal effect of an instrument had been established by frequent adjudications, (2) and relief was granted. In *Kornegay vs. Everett*, (3) the defendant relied upon a previous decision where the Court held that relief was the exception, not the rule. "Of course," was the answer, "a Court of Equity will only correct mistakes where *equity* requires it." *Laclem vs. Bacon* (4) was a case absolutely free from the rights of third parties. The insurance law authorized incorporations to prescribe the liability of members of mutual insurance companies, but the law also provided that a receiver might make assessments to meet all liability. A member of an insolvent company filed his bill to restrain such an assessment on the ground that there was a general understanding that no one could be assessed beyond the amount of his premium note. The fact that the mistake was mutual, said the Court, lent no aid to the equities arising from such a mistake. There must be something which makes it equitable for the opposite party to insist upon the enforcement of the contract. Such was the case here. "The parties expected they were liable only to the amount of their notes. This ought to be an end of the case, because it

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(1) 30 Ga. 191, 1860.

(2) *Clayton vs. Bussey*, 30 Ga. 946; *Allen vs. Elder*, 76 Ga. 674, 1886; Code of Ga. par. 3122.

(3) 99 N. C. 30, 1888.

(4) 57 Mich. 334, 1885.

shows that every member was laboring under a mistake of law which affected his liability and which would be most inequitable for any one of them now to insist on enforcing." It will be seen from this examination that the decisions that disregard the strict rule proceed on the broad principle that equity will not allow an unconscionable advantage to be taken of a mistake of law.

Mistakes of legal effect were divided into two classes, (1) and the cases, in the first of these classes, where the legal effect of the instrument was contrary to the true agreement of the parties, it will be observed, are not strictly analogous to *Hunt vs. Rousmanier*. The disposition at one time was to ignore the distinction. The Court in *Siebert vs. McAvoy* gives expression to this general view. "If the words are written when they signed the contract, no matter how much they might be mistaken as to the meaning of those words, no relief can be granted at law or in equity." (2)

The Courts, however, have given way to their inclination to afford relief in these cases by an extension of the exception in favor of mistakes of the scrivener to those instances where the mistake as to the legal effect was the result of a want of technical knowledge and skill. *Canedy vs. Marcy* (3) is the most prominent of the decisions on this point. It was proved that those who drafted the deeds understood the oral agreement and intended to carry it into effect, but the legal effect was contrary to the

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(1) Pages 87 and 99. *Supra*.

(2) 15 Ill. 106, 1853.

(3) 13 Gray, 373, 1859.

intention of the parties. "We are of the opinion," said Chief Justice Shaw, "that mistake in the legal effect of the description in a deed or in the use of technical language may be relieved against on proper proof." To the same effect was *Pitcher vs. Hennesy*.

(1) "Where the parties have made an agreement and there is no allegation of mistake in it, and in reducing it to writing, they by mistake, either because they did not understand the meaning of the words used or their legal effect failed to embody their intention in the instrument, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it." (2)

The Courts have not, however, confined their rule within the limits set in these decisions. In *Steedwell vs. Anderson*, (3) where the intention was merely to make partition of real property among four sisters, it was decided by the parties that the husbands ought to join, but no distinction was made between the insertion of the husbands' names as grantors and grantees, the parties being ignorant of the effect of the insertion as grantees. The reformation was put on the ground of want of skill, yet the case is little stronger than the decisions against relief in *Indiana*. The Court in *New Hampshire* laid down the rule in less cautious language. "Equity will reform the deed and make it what the parties at the time of execution intended to make it, and in this respect, it makes no difference whether the parties failed to

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(1) 48 N. Y. 415, 1872.

(2) *Stockbridge vs. Iron Co.* 107 Mass. 290, 1871. *Ins. Co. vs. Davis*, 131 Mass. 316, 1881.

(3) 21 Conn. 139, 1851; *Hausman vs. Burnham*, 50 Conn. 117, 1890.

make the instrument in the form they intended or misapprehended its legal effect." (1)

From the reasoning that proceeds upon the supposed analogy to mistake of the draughtsman, a tendency has recently been displayed to advance to the sounder principle that equity will compel the parties to execute their agreement as they actually intended, whether the mistake be called one of law or fact. (2) While it may appear upon the face of the instrument that the real intention of the parties has been frustrated, without need of positive proof of a previous compact, the Courts have, nevertheless, always proceeded upon the principle that they were conforming the contract to a prior agreement, and it was said that proof of such prior agreement must be clear. *Benson vs. Markol* (3) marks a departure from this doctrine. In this case, the plaintiff, to confirm the title to a small strip of land, executed a quit claim deed that had the effect of discharging a mortgage held by him upon the whole tract. The Court, while admitting that the facts would allow them to restrict their decision within the limits set by *Canedy vs. Marchy*, frankly stated that the existence of a prior agreement was not necessary as a condition to justify equitable relief. "If, without any agreement having been made prior to the time of the execution of this instrument, the intentions of the party were merely to convey certain land, and if by mutual mistake or ignorance terms are employed which had the legal effect not merely to convey the land but also to accomplish something entirely dif-

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(1) *Kennard vs. George*, 44 N. H. 440, 1863.

(2) *Eastman vs. Assn.* 65 N. H. 176, 1889.

(3) 37 Minn. 30, 1887.

ferent and relating to a different subject, to which their minds had not been directed, relief may be afforded." The plain inference to be drawn from the language of the Court is, that relief will not be limited to that class where the instrument fails to express the previous agreement, but will be extended to those cases where the instrument was what the parties intended, but where one of the parties will obtain an unconscionable advantage by means of its un contemplated legal effect.

Griswold vs. Hazard (1) is the most important decision on this subject in recent years. Mr. Durant, President of the Credit Mobilier, while visiting Rhode Island, was arrested on a writ of ne exeat issued by the Supreme Court of that State. This writ was discharged after he had given a bond with Griswold and another as sureties. There was a discussion as to the agreement by the respective counsel and the bond as signed was conditioned "to abide and perform the decree of the Court." Suit was brought on this bond against Griswold after failure by Durant to perform the decree of the Court. Griswold filed a bill in equity stating that he had signed under the mistaken supposition that the bond was merely a bail bond and that he would be liable only in case Durant failed to subject himself to process. The bill was dismissed in the Circuit Court of the United States without hesitation, (2) but in the Supreme Court the judgment was reversed, and the defendants were perpetually enjoined from suing on the bond. Justice Harlan, in delivering the opinion of the

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(1) 141 U. S. 260, 1891.

(2) 26 Fed. Rep. 133, 1886; see 21 Fed. Rep. 178; 13 R. I. 127, 1880.



Court, while admitting a conflict of evidence, reasoned that the testimony of the complainant was sustained by the inherent probabilities of the case and that the intention was to make a bail bond. If the bond means more than that, it is a case of mistake as to the legal effect of the instrument. There was no mistake as to the mere words of the bond, but there was a mistake as to the legal import of the terms employed. A Court of Equity ought not to allow a mistake thus caused to stand uncorrected and thereby subject a surety to a liability he did not intend to assume, and the time to impose upon him. "The rule," he adds, "that an admitted or clearly established misapprehension of the law does create a basis for the interference of Courts of Equity, resting on a discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon this point, both English and American." (1) Justice Brown, in dissenting, could not see how it could be claimed that the mistake was mutual, and in addition to this the testimony fell far short of the requisite certainty. But the very mistake that was sought to be proved he thought was such as equity could not relieve against. There was some conflict as to what was said at the interview, but Griswold admitted that he had read the bond and noticed the terms "abide and perform," and inferred that it was a bail bond. "He apparently refrained from asking any explanation of its meaning, but assumed himself to construe it, and gave it a different meaning from that which the law gave it." In concluding,

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(1) Redfield's Ed. Story's Equity Jurisprudence, sec. 138.

he said: "I cannot avoid the impression that the present defence is an afterthought."

The mistake in this case did not occur through want of technical knowledge on the part of the scrivener; the instrument was accepted by both parties as drafted, but its legal effect was to create a greater liability than appears to have been contemplated, and the Court, holding that it would be inequitable to allow the obligee to take advantage of the mistake, restricted the operation of the instrument to those cases only for which it was most probably designed.

The rule, then, that mistake of legal effect does not afford grounds for relief is not so firmly settled as was at one time believed. Without shaking the principle established in *Hunt vs. Rousmanier* that equity will not make for the parties a generically different contract which it was to be presumed they would have made had they been better informed, it must be admitted that a large class of cases cannot be construed by a narrow rule, and that the right to interfere rests within the discretion of a Court of Equity; so much, at least, may be inferred from *Griswold vs. Hazard*. A clear distinction exists between the mistakes of law made in reducing a preliminary agreement to the form of a contract and mistakes as to the subsequent legal effect of a contract, but the former, a well recognized exception to the strict rule, has frequently been applied where the cases were of the latter class, and the line between them is not always distinct. The results of the latest decisions indicate that the Courts are growing more inclined to restrict instru-

ments to meet the true intention of the parties where a case in conscience is presented.

#### IV. Mistake of Law in the Transaction.

The rule *ignorantia juris non excusat*, it is said, is one of public policy on both expediency and necessity. Has this necessity ceased to exist? By no means. The class of cases that the maxim was first designed to meet was, that where the mistake of law is in the very transaction itself, where, as is commonly said, a person's act is void or illegal. "The mistakes of law against which equity will not relieve," said the Court in *Stafford vs. Fetters*, (1) "are those which pertain to the subject of the contract and were inducements thereto or considerations therefor." If a person with full knowledge of the facts deliberately adopts a course of action, he does so at his peril, and the Court will not allow him to escape the consequences of his act on the ground that if he had been properly advised such liability would not have accrued.

Mistakes of law are frequently made by those acting in a representative capacity. In *Teede vs. Johnson*, (2) a replication that the plaintiff had signed a release as trustee, not as a creditor, was held bad as disclosing no grounds for relief in law or equity. In *Peters vs. Florence*, (3) the mistake was that of an executor, and in *Hampton vs. Nicholson*, (4) the Court declared that they knew of no case where a

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(1) 15 Iowa 484, 1881.

(2) 11 Exch. 840, 1856.

(3) *Supra*.

(4) 8 C. E. Green 423, 1873.

sale was confirmed which had been made by an executor without power to sell. (1) A tenant for a term of years had released to the executor (who had power to sell at the expiration of the term) and then purchased the fee simple, both parties acting by advice of counsel. "Purchasers," said the Court, "frequently accept deeds, by which no title is conveyed, under a misapprehension of the law." One is bound to know the provisions under which he derives title. (2) *St. Louis vs. Priest* is an example of a mistake of a trustee. The City Comptroller was trustee to sell property if default was made in the payment of purchase money. He sold the property through his attorney in fact, contrary to the rule in Missouri that a trustee could not delegate his power to sell. The deed was accordingly set aside. (3) In *Dill vs. Shahan* an executor who purchased testator's property sold at auction, subsequently discovered that the sale was without authority and sought for a cancellation of the notes given in payment. The complainant was both vendor and vendee and could not be allowed to stultify himself. He acted on his unbiased judgment and made a bad bargain. (4)

The rule is equally strong where a person transacts business in his ordinary capacity. The deed of feme covert directly to her husband has been held void. "The mistake being simply a want of knowledge as to what the law required to make

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(1) *Brown vs. Armstead*, 6 Rand. 594, 1828.

(2) *McAnich vs. Laughlin*, 12 Pa. 371, 1850; *Berkenhauser vs. Schmitt*, 45 Wis 316, 1878.

(3) 88 Mo. 612, 1886.

(4) 25 Ala. 694, 1854; *Rochester vs. Bank*, 13 Wis. 432, 1861.

the deed effective." (1) In *Carpenter vs. Jones*, (2) the decedent left no kin and the plaintiff wrote, as largest creditor, recommending the appointment of a friend as administrator. The Court appointed a stranger and held that the letter amounted to a declaration of willingness to decline administration. "It is not to be presumed," said the Court in Michigan, "that any person of ordinary intelligence supposes that marriage can be dissolved by mutual consent." (3)

The rule is particularly to be observed where the parties are engaged in legal proceedings.

"If ignorance of the law could be admitted in judicial proceedings as a ground of complaint or defence, the Court would be embarrassed by inquiries almost interminable, and the extent of the legal knowledge of each individual suitor would be the material fact upon which judgments would be founded." (4) The mistake of an attorney at law should, on principle, give no ground for relief. (5) Nor will ignorance of overruled decisions avail. (6) It is hardly necessary to multiply illustrations, but the case of *Weed vs. Weed* (7) is an apt one. The plaintiff had a life tenancy in real estate without power of alienation. The property was sold on execution and the creditor who redeemed it received a deed. The plaintiff had permitted the time

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(1) *Gebb vs. Rose*, 40 Md. 387, 1874

(2) 44 Md. 625, 1876.

(3) *Lapp vs. Lapp*, 43 Mich. 387, 1880.

(4) *Hardigee vs. Mitchum*, 51 Ala. 151, 1874.

(5) *Magniac vs. Thompson*, 2 Wall Jr. 209, 1852.

(6) *Lyon vs. Richmond*, 2 Johns. Ch. 57, 1816.

(7) 94 N. Y. 243, 1883.

for redemption to expire, acting under advice of counsel, and her interest was not subject to execution. She was left to her remedy at law, having assumed the risk of the sale; the Court could not relieve her from the consequences of her mistake if such it should prove to be. In this class of cases, and it is a large one, a Court of Equity will decline to interfere, the mistake of law being in the very transaction itself or forming the chief inducement to the act in question.

### V. Money Paid by Mistake of Law.

Reference was made to the early cases in which the rule was laid down that money paid under a mistake of law could not be recovered back. (1) The rule has been enforced in equity as well as law. In *Goodman vs. Sayers*, (2) Sir Thomas Plummer observed: "It is admitted that it is impossible to recover the money at law. Upon what principle can it be said he is not concluded in equity also?" While this is the general rule (3) exceptions to it are not positively denied. In *Rodgers vs. Ingham*, (4) said to be the leading English case (5) an executor erroneously conceived that the payment of interest on a legacy should have been made to a person different from the plaintiff, to whom it has been previously paid. The plaintiff, by advice of counsel, repaid the arrears but filed this bill on discovering that she had mistaken the law. In rendering

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(1) *Bilbie vs. Lumley*, etc.

(2) 2 Jacob & W. 249, 1820.

(3) *Railway vs. Cripps*, 5 Hare 90, 1846.

(4) L. R. 3, Ch. D. 331, 1876.

(5) *Brett's Modern Leading Cases in Equity*.

judgment for the defendant, Lord Justice James distinguished this case from *Bilbie vs. Lumley*, (1) and said that relief had never been given in case of a simple money demand by one person against another, there being between those persons no fiduciary relation and no equity to supervene by reason of the conduct of either party. Lord Justice Mellish, while assenting to the judgment, added that he thought a Court of Equity could relieve against a mistake of law if there was any equitable ground which makes it, under the particular facts of the case, inequitable that the party who received the money should retain it; and Baggallay, L. J., remarked that he agreed with what Lord Brougham had said in *Clifton vs. Cockburn* (2) that cases might arise in which it would be the duty of the Court to relieve against an error of law. In the subsequent case of *Daniel vs. Sinclair*, (3) the respondent, on the erroneous supposition that a clause in a mortgage authorized compound interest, consented that the accounts should be so kept and confirmed them in writing. The Judicial Committee of the Privy Council refused to allow the overcharge, Lord Monkswell saying that the line between mistakes of law and of fact was not so clearly and sharply drawn in equity. It has been firmly laid down that if an officer of the Court receives money by mistake of law "he must recognize the rules of honesty between man and man and act accordingly." (4)

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(1) *Supra*.

(2) 3 M. & K. 76, 1834.

(3) L. R. 6 Appeal Cases 180, 1881.

(4) *In re Opera Co.* 2 Ch., 154, 1891; *ex parte James L. R.* 9 Ch., 609, 1874.

In the United States, the rule has been enforced in many jurisdictions, particularly in the Federal (1) and New York (2) Courts. "No discussion of cases can be gone into," said Justice Catron, "without hazarding the introduction of exceptions that will be likely to sap the direct principle we intend to apply." In Pennsylvania, Justice Sergeant said (3) "Leniency would only encourage negligence." The rule, however, is not universally accepted. In *Haven vs. Foster*, (4) the Court avoided a decision, contenting itself with an affirmation of the doctrine that mistake of the law of another State is to be regarded as a mistake of fact. In Kentucky (5) and South Carolina (6) the rule was repudiated at an early date. In Georgia, in *Culbreath vs. Culbreath*, (7) the Court, after stating that the authorities were divided, declared: "If the authorities *were* balanced, we could feel justified in kicking the beam and ruling according to that naked and changeless equity which savages understand, which cultivated reason approves, and which Christianity not only sanctions but in a thousand forms has ordained." In Connecticut, the Supreme Court has said: (8) "We mean distinctly to assert that when money has been paid by one under mistake of his rights and duty, and which he was under

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(1) *Bank vs. Daniel*, 12 Pet. 32, 1838.

(2) *Mowatt vs. Wright*, 1 Wend, 355, 1828.

(3) *Edge vs. Koontz*, 3 Barr 111, 1846; see *Beard vs. Beard*, 25 W. Va. 486, 1885.

(4) 9 Pick. 11, 1829.

(5) *Ray vs. Bank*, 3 B. Monroe 510, 1843.

(6) *Lawrence vs. Baubein*, *supra*.

(7) 7 Ga. 64, 1849.

(8) *Northrop vs. Graves*, 19 Conn. 548, 1849; *Mansfield vs. Lynch*, 59 Conn. 320, 1890.



no legal or moral obligation to pay, and which the recipient has no right in good conscience to retain, it may be recovered back." It would seem, then, that in England the payment of money is treated by Courts of Equity in a manner little different from other mistakes of law, while in the United States, different rules prevail in different forms, although the strict rule is predominant. Many of these cases of mistake in the payment of money occur when the parties acted in a representative capacity, and the mistake was such as would not entitle them to relief under any circumstances, but upon principle it is impossible to see why the payment of money should stand, in a Court of Chancery, upon a different plane from any other transaction. The rule in *Bilbie vs. Lumley* is followed in equity probably through an unwillingness to disturb what has come to be regarded as a settled principle on the law side of the Court. It would not, it is conceived, detract from its proper force, to restrict it to those classes where it can in good conscience be applied.

## VI. Compromises.

The subject of compromises does not call for a lengthy discussion as it has been fully considered in the books and the rules administered with uniformity. Whenever the parties to a dispute, with full knowledge of the circumstances, fairly agree to compromise their conflicting claims, such compromise, will not be disturbed by a Court of Equity on the ground of mistake whether of fact or law. (1)

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(1) Story's Eq. Jurisp., sec. 121 et seq.; Bispham's Equity, 189.

Cases on this subject, occurring at an early date, are fully discussed in the opinion of Lord Cottenham in *Stewart vs. Stewart*, (1) particularly two judgments of Lord Hardwicke. (2) "Even though it turns out that one gains a great advantage," said Lord Alvanley, "if the agreement was fair and reasonable at the time it shall bind." (3) The rule is not confined to family arrangements. It may refer, as in *Baxendale vs. Seale*, (4) to a contract for the sale of land, or, as in *Mills vs. Miller* (5), to a compromise for quieting the title of land.

But family compromises are enforced with particular strictness. "It is unnecessary," said Lord Brougham, "to cite authorities to show how strongly the Court always leans in support of family arrangements and how reluctantly it will disturb them." "In the case of family compromises," said the Court in *Trigg vs. Read*, (6) using almost the words of Story, "agreements are upheld with a strong hand, and an equity has been administered in regard to them which has not been applied to agreements generally, upon the ground that the honor and peace of families make it just and proper to do so." The subject has been repeatedly discussed in Pennsylvania where the rule has been firmly applied. (7)

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(1) 6 C. & F., 911, 1838.

(2) *Pullen vs. Ready*. 2 Atk. 587, 1743; *Cory vs. Cory*, 1 Ves. Sr. 19, 1747.

(3) *Gibbons vs. Caunt*, 4 Ves. Jr. 849, 1799.

(4) 19 Beav. 601, 1854.

(5) 2 Wood (Neb.) 299, 1893; *Hall vs. Wheeler* 37 Minn. 522, 1887.

(6) 5 Hump (Kty.) 529, 1845.

(7) *Wilens's Appeal*, 195 Pa., 121, 1884; *Gormly vs. Gormly*, 130 Pa. 467, 1889.

"The principle must not work injustice," said Sharswood, J., (1) "there must be not only good faith but a full disclosure of all the circumstances of the situation." (2)

It is to be noticed that a mere acquiescence in a course of action adopted in dealing with property will not be upheld as a family arrangement. The distinction is pointed out by Lord Chancellor Campbell in *Bullock vs. Downes*. (3) In this case it was assumed for many years by the family that a certain devisee was not entitled to a share in a residuary estate also, as next of kin. This was held not such a family arrangement as would prevent an assertion of the claim. The course adopted was a mere assumption and not the result of legal discussion and agreement.

To summarize: the history of the equitable doctrines regarding mistake of law appear more in the nature of a catalogue of isolated decisions than the review of the continuous development of a rule. While the common law maxim *ignorantia juris non excusat* must form the basis of all discussions of this subject, Courts are not compelled to go beyond its meaning, and hold that every one is *presumed* to know the law, a presumption regarded by Lord Blackburn as contrary to reason and common sense. It is surprising that Courts of Equity should ever have submitted to a hard and fast rule of law when it is remembered that freedom and flexibility are characteristic of equitable methods. While fully

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(1) *Wistar's Appeal* 74 Pa. 484, 1876.

(2) *Gordon vs. Gordon*, 35 *Swanst* 463, 1819.

(3) 9 H. L., C., 1, 1860.

recognizing that the law must prevail where the equities are equal, the English Courts have not hesitated to act upon the principles concisely stated by Lord Justice Mellish, (1) and relieve against mistakes of fact, whenever such relief is called for by the situation of the parties and the circumstances of the case.

In the United States the policy of the Courts has recently undergone a change, and the most that can be said is that the law is still in process of development. In the early days of the Republic the influence of prominent jurists was exerted in favor of a strict enforcement of the maxim, and while the possibility that exceptions might occur was never denied, all efforts to obtain the recognition of such exceptions were regarded with distrust. During the last thirty years a change has taken place. The decision of Lord Westbury in *Cooper vs. Phibbs* has drawn attention to that great class of cases where the mistake related to a private pre-existing right, and there is a decided inclination to place these in the same category as mistakes of fact.

Where the mistake of law is in regard to the legal effect of an instrument it has been said, and it is still said very positively, that equity will not interfere. The term "legal effect" has been unscientifically applied to classes of cases that called for a different treatment, but this is now a thing of the past, and relief is generally given where the instrument, through mistake of law, fails to embody the primary agreement of the parties. But proof of

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(1) *Rodgers vs. Ingram*, *supra*.

the primary agreement must be clear and certain. When, however, relief is sought against an agreement to which the parties have fully assented, on the ground that there was a mistake as to its subsequent legal effect, the Court will move with caution. To force upon the defendant a new contract generically different from the old would be unjust; but a Court of Equity should never allow a transaction to proceed which imposes upon one party by reason of mistake, a liability not intended to be assumed, or deprives him of rights or interests not intended to be surrendered.

In the ordinary cases where the mistake forms part of the transaction, being the chief inducement to or consideration for the act in question, equity does not relieve simply because there is nothing in the situation of the parties that calls for interference with a course of action which the parties have deliberately chosen to adopt. In such cases the course of the law will not be disturbed. Difficulties arise only where the Court, by refusing relief, will allow the party in whose favor the mistake is made to obtain a benefit contrary to good conscience. In such a case the granting of relief rests in the discretion of the Court, (1) a discretion, it is true, that must be exercised with the greatest care, but the existence of which is now too late to deny.

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(1) *Griswold vs. Hazard*.



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## NOTES

The doctrine of absolute privilege in the law of defamation has received a new application in England in the case of *Chatterton vs. Secretary of State for India in Council*, [1895] 2 Q. B. 189. The Secretary of State for India had written a communication derogatory of the plaintiff, an army officer, to the Under-Secretary of State to be used in reply to a question, asked the Government, in the House of Commons. This communication being published, the plaintiff sued for libel. He contended that he was entitled to prove actual malice, because the statement was only qualifiedly privileged. But the Court of Appeal (Lord Esher, M. R., Kay & A. L. Smith, L. JJ.) held that the communication was absolutely privileged, and hence not a subject of judicial investigation. Lord Esher gave the ground of his opinion in the following words:

"If an officer of state were liable to an action of libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege and it would be necessary that he should be called as a witness to deny that he acted maliciously. That he should be placed in such a position and that his conduct should be questioned before a jury would clearly be against the public interest, and prejudicial to the independence necessary for the performance of his functions as an official of state. Therefore, the law confers upon him an absolute privilege in such a case."

This case seems to be the first decision on the question in England; although there are two cases (Anderson vs. Hamilton, 2 B. & B. 156 n; Homer vs. Benwitck, 2 B. & B. 130), where, under the law of evidence, the same view is taken of the nature of state communications. So far as we are aware, the point has never been determined by the Courts of this country. The English decision seems sound in principle, and there is nothing peculiar in the constitution of the English government to prevent its adoption here.

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Among the subjects recommended by the Committee on Legal Education of the American Bar Association, in its annual report last month, for introduction into the law school curriculum, is "Legal Ethics." So far as our knowledge extends, a distinct course in this subject is offered in no law school in this country. In some, a few words are said in the course on "Practice;" but even this is unusual;



in others, the students are dependent upon the hints they receive on their general attendance at the school.

Various reasons might be offered in explanation of this condition of affairs; but it is sufficient that its disadvantage is generally recognized, for the report of the Committee is but the reflex of the opinion of leading legal minds of the day. For ourselves, we believe that such a course is both desirable and necessary. The law school, now the most frequent mode of admission to the Bar, should perform its part in moulding professional character and practice. The legal profession demands the highest standard of honor and morality; this can be universally obtained only when the Bar is furnished with lawyers inculcated with the best principles of professional conduct.

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# THE QUIZ.

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It is the general purpose of this department of the Pennsylvania Law Series to direct attention briefly to such changes as from time to time shall occur in the body of the law, either through new or different applications of the principles of the common law or by means of statutory enactments.

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**If valuable presents are given to a donee, who is engaged to marry the donor, can they be recovered if the donee unjustifiably breaks the engagement?**

When a supposed true love is found to contain some alloy, and the dreams of wedded bliss are dissipated by a broken engagement, what may the parties do with the presents they have received from each other? Must they return them, or may they keep them, if they choose? That is, considered, not socially, but from a legal standpoint alone. Or again, must a jilted lover who has lavished gifts of value upon the one who promised to be led to the altar by him, stand by, without redress, and see his gifts bedecking her as the girl or the bride of a more successful rival?

If this question was to be treated from a social and moral standpoint, there would hardly be two sides to the question. The code of morals and social custom would dictate a ready answer in the affirmative to the query, for it is a rule universally recognized that if an engagement to marry is broken, the presents and tokens of affection given while "Love's young dream" lasted are returned to their respective donors. Once in a while, however, we find persons who insist on standing upon their strict legal rights. Rather than have their legal rights trampled upon they are willing to bear the taunts and flings and ostracism with which society punishes those who refuse to obey its mandates. It is such martyrs that make such a question possible.

In looking into this question to determine what the strict legal rights of the donor and donee are in a case like this, we find but little direct authority upon it. This would seem to indicate either that people have been reluctant in flinging themselves in the face of a rule of good breeding and good morals, or that the question has been considered settled.

This question was recently raised in the Court of Common Pleas in Philadelphia, and attracted a great deal of attention from the members of the Philadelphia Bar, and also in social circles, for the parties interested were both of good social standing. The action was an action of trover, begun by a *capias* against a young lady who had refused to return presents of value to her fiancé, whom she had jilted. Unfortunately, as an authority upon this question, the case came to an abrupt end, for after a preliminary skirmish the young lady defendant capitulated and returned the gifts. From the attention given to the masterly argument of the plaintiff's counsel, by a throng testing the capacity of the court-room, the case served to show that the question is not the frivolous one it might at first appear, but is really a very interesting one.

It involves the discussion of the principles of the law relating to gifts. There seems to be an idea prevalent even in legal minds, whose attention has not been specially directed to the question, that a gift of personal property, which has been executed by the delivery of the thing intended to be given, negatives the thought that any condition can be annexed to it. That this might be true as to third parties who

may have acquired rights by dealing with one who is apparently invested with full ownership, cannot be doubted; but it is also just as true that as between the donor and the donee conditions, either precedent or subsequent, may be annexed to a gift of personal property, and if not performed the property may be recovered. If any authority is needed for these elementary principles, it will be found collected in Schouler's "Personal Property," § 128.

While it is thus true that conditions may be annexed to gifts, such conditions in cases of ordinary gifts are generally express and the subject of proof. So, no doubt, when a young man makes a present to his fiancée, if he were to say, "I make this upon condition that you carry out your engagement to marry me," and he could prove that he made such a condition at the time of presenting the gift, his recovery of the gift, in case of her refusing to carry out the engagement, would be free from doubt. But in that period of an engagement no such thought ever enters the young man's head; he has entire confidence in the original promise of his adored one, and so he makes his gifts freely, and without annexing any conditions whatever to his gifts; that is, express conditions. Is there any implied condition to such gifts arising from the relation between the donor and donee? Is the consummation of the engagement to marry an implied condition, so that if the marriage fails the gifts revert to the donor? Let us see what we can glean from the authorities. Away back in one of the old English reports is found the case of *Young vs. Burrell*. Cary's Reports, 77. Cary was the reporter

of the Court of Chancery during Lord Bacon's time. The case is reported as follows: "The defendant confesseth by her answer the having of a tablet or pomander in gold, demanded by the plaintiff; and as to the twenty pounds likewise demanded by the plaintiff, by him left with the said defendant as a token, at such time as he was a suitor for marriage to the defendant; she confesseth the same was left with her against her will, and she delivered the same over unto one Sydole, her brother, who was a dealer with her on the plaintiff's behalf, to the end that he should deliver the same over to the plaintiff. It is ordered that the tablet be forthwith delivered by the defendant to the plaintiff, which was done promptly in Court, and as to the twenty pounds the plaintiff should call in the said Sydole by process."

From this meagre report can be gathered that it was a bill in equity to compel the young lady to restore presents given to her by her suitor, and the Court decreed that the gifts should be restored. This, therefore, is a very old precedent in favor of the affirmation of the question.

Another very old precedent is the case of Beaumont vs. Fletcher reported in 2 Mod. 141, also in 14 Vin. Abr. under the title Gift, page 7. It is as follows: "A made a present of a jewel to a lady whom he courted, but the marriage not taking effect, he brought an action of detinue against her, and she, taking it to be a gift, offered to wage her law, but the Court was of opinion that the property was not changed by this gift, being to a special intent, and therefore would not admit her to do it."



This case is also authority for the affirmative of the question and that an action of detinue would lie to recover such gifts.

In the case of *Robinson vs. Cummings* 2 Atk. 273, Lord Hardwicke laid down the rules in cases of this kind as follows:

"I think, in cases of this nature, these rules may be laid down: That if a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him."

The Lord Chancellor seems even to have gone farther than an affirmative answer to our question. He puts it that a person simply paying his addresses to a lady, without being engaged to her, and receiving encouragement from her, presents her with gifts of value, he can recover such gifts in the event of his suit being unsuccessful. If this view is a correct one, it is suggestive of a very convenient line of action for young men setting about to win a young lady's hand. He could be lavish with his gifts, with the assurance that if he didn't win the girl he could get his presents back.

In Fonblanque's old work on Equity, § 15, we find the affirmative answer to our question supported by some very clear-worded reasoning. He says: "But that which helps us most in the finding out the true meaning is the reason or cause which moved the will, and this is of the greatest force when it evidently appears that some one reason

was the only motive that the parties went upon, which is no less frequent in laws than in facts. And here that common saying takes place, *that the reason ceasing, the law itself ceases*. So a present made in prospect of marriage may be revoked and demanded back if the marriage does not take effect, especially if it sticks on that side to whom the present is made." He also says in a note that the Civil Law was to the same effect.

The only American authority I have been able to discover is a late Vermont case, *Williamson vs. Johnson*, 62 Vt. 398 (1890). In that case the plaintiff being engaged to marry the defendant, sent her money with which to buy her wedding outfit. She afterwards, without cause, refused to fulfill her engagement and married another fellow. The plaintiff then brought an action of assumpsit to recover the money and it was held that he could recover. The Supreme Court said: "We hold that the gifts were not absolute, but conditional, and that when the condition failed a right of action accrued to the plaintiff to recover the money."

These are the only authorities I have been able to discover bearing directly upon the question, and they all agree that presents given under such circumstances may be recovered. They coincide with the rule of society that such presents should be returned and probably the social rule grew out of the legal one, for as we have seen it is a very ancient one.

After all there does not seem to be any other logical conclusion to the question. The authorities sustain it and the reasoning is also entirely in favor

of the affirmative of the question. A gift is a matter of intention, and to determine whether there are any qualifications annexed to it, the transaction must be viewed in the light of surrounding circumstances. Viewing the whole transaction surrounding such a gift as this, in order, as Fonblanque puts it, to find out "the reason or cause which moved the will," we would find that such a gift is given and received on the expectation of both parties that their engagement to marry would be consummated. Therefore, such a gift must be considered as being given and received upon the implied condition that the marriage takes place, and if the condition is not fulfilled the gifts must be returned, or they may be recovered either through the means of a bill in equity or an action at law.

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## CONTENTS.

|                                                                   | Page. |
|-------------------------------------------------------------------|-------|
| I. Declarations of Pedigree, . . . . .                            | 1068  |
| CHESTER NYE FARR, JR.                                             |       |
| II. Notes, . . . . .                                              | 1089  |
| III. The Quiz, . . . . .                                          | 1093  |
| Are the Jury in Criminal Cases in Pennsylvania Judges of the Law? |       |

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# Declarations of Pedigree

BY

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## Table of Cases Cited.

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|                                                                |                   |
|----------------------------------------------------------------|-------------------|
| Barnum vs. Barnum, 42 Md. 251 . . . . .                        | 8, 14             |
| Berkeley Peerage Case, 4 Camp. 401 . . . . .                   | 10, 14, 15, 16    |
| Blackburn vs. Crawfords, 3 Wall. 175 . . . . .                 | 9, 10, 11, 12, 13 |
| Butler vs. Mountgarret, 7 H. L. C. 33 . . . . .                | 15                |
| Canjolle vs. Ferrié 23 N. Y. 90 . . . . .                      | 14                |
| Chapman vs. Chapman, 2 Conn. 347 . . . . .                     | 14                |
| Cherry vs. State, 68 Ala. 29 . . . . .                         | 2                 |
| Commonwealth vs. Felch, 132 Mass. 23 . . . . .                 | 4, 14             |
| Connecticut Life Ins. Co. vs. Schwenck, 94 U. S. 593 . . . . . | 5, 7              |
| Cooke vs. Lloyd, Peake's Ev., App. xxviii . . . . .            | 7                 |
| Crispin vs. Doglioni, 3 Sw. & Tr. 44 . . . . .                 | 7                 |
| DeHaven vs. DeHaven, 77 Ind. 236 . . . . .                     | 14                |
| Greenfield vs. Camden, 74 Me. 56 . . . . .                     | 2                 |
| Haddock vs. B. & M. R. Co., 3 Allen 298 . . . . .              | 7, 8              |
| Haines vs. Guthrie, L. R. 13 Q. B. D. 818 . . . . .            | 4, 6              |
| Jewell vs. Jewell, 1 How. 219 . . . . .                        | 7                 |
| Johnson vs. Lawson, 2 Bing. 86 . . . . .                       | 7                 |
| McCarthy vs. Terry, 7 Lans. 236 . . . . .                      | 2                 |
| Mima Queen vs. Hepburn, 7 Cranch 290 . . . . .                 | 2                 |
| Monkton vs. Attorney-General, 2 Russ. & M. 147 . . . . .       | 9, 10, 11, 12     |
| Northbrookfield vs. Warren, 16 Gray, 171 . . . . .             | 5, 6, 7           |
| Northrop vs. Hale, 76 Me. 306 . . . . .                        | 1, 7, 14          |
| People vs. Fire Ins. Co., 25 Wend. 205 . . . . .               | 14, 15            |
| Rex vs. Erith, 8 East 539 . . . . .                            | 2, 4, 6           |
| Shields vs. Boucher, 1 DeG. & Sm. 40 . . . . .                 | 2                 |
| Shrewsbury Peerage Case, 7 H. L. C. 26 . . . . .               | 7                 |
| Sitler vs. Gehr, 105 Pa. St. 577 . . . . .                     | 9, 10, 11, 12, 13 |
| Steen vs. Bowman, 13 Pet. 209 . . . . .                        | 7, 14             |
| Sturla vs. Freccia, L. R. 5 App. Cas. 641 . . . . .            | 8                 |
| Tyler vs. Flanders, 57 N. H. 618 . . . . .                     | 7                 |
| Vowles vs. Young, 13 Ves. 140 . . . . .                        | 7                 |
| Wilmington vs. Burlington, 4 Pick. 174 . . . . .               | 2                 |

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## Declarations of Pedigree.

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Declarations by deceased persons as to questions of pedigree may be conveniently divided into two parts :

I. What facts may be held to be facts of pedigree ?

II. Who may be declarants, or who may state such facts ?

Each of these is subject in turn to a distinct qualification. The first proposition qualified by the necessity of having pedigree a fact in issue before such statement can be relevant testimony ; and the second requiring the statements of each declarant to have been made *ante litem motam*, or prior to the beginning of the controversy in which the question of pedigree becomes a matter in issue.

I. Courts have had no difficulty in adopting a definition which they have regarded as satisfactorily inclusive of all the facts which may be proved under the head of pedigree, but the application of it has not, apparently, been a matter of such simplicity.

According to Greenleaf, "the term pedigree embraces, not only descent and relationship, but also the facts of birth, marriage and death and the times when these events happened." Taylor slightly modifies this for the purpose, it would seem, of introducing the necessary qualification, by adding "provided such facts are required to be proved for some genealogical purpose." Mr. Justice Virgin, in the case of *Northrop vs. Hale*, (1) further adds that "in a

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(1) 76 Me. 306.

qualified sense," legitimacy and illegitimacy may become the proper subjects of such declarations. The qualification referred to here is the one founded, according to Lord Mansfield, on "decency, morality and policy," which prevents parents from bastardizing their children who have been born in wedlock. Inasmuch as facts regarding legitimacy and illegitimacy must of necessity depend on those of birth and marriage, this statement of the Maine Justice can scarcely be said to have added much to the definition.

A distinction is drawn by the Courts between "date" and "place" of the event of birth, marriage or death. Place of birth, marriage or death is not a fact of pedigree. (1). The date of these occurrences will, however, subject to the main qualification mentioned, be a matter of pedigree. In the case of *Shields vs. Boucher*, (2) Vice-Chancellor Knight-Bruce admitted declarations of a deceased person as to the place from which she and her family came, and the place where she was married. The question at issue in this case was the relationship of the deceased mother of one of the plaintiffs to another deceased person. The opinion of the Court pointed out the fact that in certain cases the question of "place" might arise as necessary to prove a genealogical fact, and would only be excluded in such cases when the question at issue was not one of pedigree. The Vice-Chancellor proceeded to distinguish it from the case of *Rex vs. Erith* (3). In this case a

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(1) *Inhabitants of Wilmington vs. Inhabitants of Burlington*, 4 Pick. 174; *McCarty vs. Terry*, 7 Lans. 236; *Cherry vs. State*, 68 Ala. 29; *Greenfield vs. Camden*, 74 Me. 56; *Mima Queen vs. Hepburn*, 7 Cranch 290.

(2) DeG. & Sm. 40.

(3) 8 East 539.

deceased father's statement that his bastard child was born at Erith, was held inadmissible, Lord Ellenborough observing that "the controversy was not as in a case of pedigree from what parents child had derived its birth, but in what place an undisputed birth derived from known and acknowledged parents had happened." The question at issue was, therefore, not one of pedigree.

Though the point of view of the Court in *Shields vs. Boucher* would seem the more rational of the two ways of looking at the question, and though it is, unquestionably, distinguishable from *Rex vs. Erith*, still, the attitude of the American Courts as shown in the cases cited *supra*, would seem to indicate a hasty following of English cases without due regard to their true intent, and an application of the rule to exclude evidence of locality entirely. The point in the American cases was one of birth, but there can obviously be no distinction between the three as a matter of genealogical inquiry. Circumstances may easily be conceived in which places of marriage and death would form valuable evidence from which pedigree might be inferred.

In general it may be said that the rule, in its most logical form, would exclude any specific statement of a fact, whether it be birth, marriage, age or death, unless by the proof of such fact an inference of genealogy may be drawn.

Under no circumstances, however, can a fact of pedigree, fulfilling the requisite qualifications, be admitted in evidence, unless the matter of pedigree be directly in issue. When the fact of pedigree is an evidentiary fact, and not a question at issue, the

matter of pedigree is too remote to be of sufficient importance to warrant the introduction of hearsay evidence.

A few instances will suffice to render this clearer. *Haines vs. Guthrie*, (1) was an action of assumpsit for horses bought and sold. The defence was infancy, and that the horses were not necessities. An endeavor was made to prove the fact of infancy, on the ground that it was a matter of pedigree, by an affidavit made in a chancery suit, at the time of the son's birth by the father, since deceased. This evidence was rejected. Brett M. R. observed: "What the family of the defendant is, is immaterial, whose son he is is immaterial, whether he is an illegitimate or legitimate son is immaterial, and whether he is an elder or a younger son is immaterial. No question of family is raised in this case."

*Rex vs. Erith* (2) was a question of a pauper's settlement. Statements made by the deceased father of the pauper, as to the place of pauper's birth, were held inadmissible. Here the question at issue as Lord Ellenborough pointed out, was simply a question of locality, and not of genealogy.

In *Commonwealth vs. Felch*, (3) an attempt was made to introduce in evidence statements made by a deceased woman as to her pregnancy on the ground of its being matter of pedigree. The case being one of a miscarriage the statement was excluded as not one of pedigree.

We find, however, in the case of *Northbrookfield*

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(1) L. R. 13 Q. B. D. 818.

(2) 8 East, 539.

(3) 132 Mass. 23.



vs. Warren (1) statements in the opinion which appear to be diametrically opposed to the decisions cited above. The issue was between two separate parishes in regard to the settlement of a pauper, this fact of settlement depending upon whether the pauper's father was illegitimate or not. A witness testified to having seen pauper's father, then a little child, during the lifetime of a person who died before the date of the marriage of the child's parents. There was no dispute about the date of the marriage. Evidence was then brought to prove the date of the death of the person mentioned in the witness' testimony, and for this purpose an inscription on a tombstone, and a parchment containing dates of death, etc., of the family of the person in question were offered. These were admitted with the following statements by the Court: "Some authorities seem to limit the authority of this species of proof" (i. e. proof of pedigree) "to cases where the main subject of inquiry relates to pedigree and where it is directly in issue. But upon principle we can see no reason for such limitation. If this evidence is admissible to prove facts at all, it is equally so in all cases whenever they become legitimate subjects of judicial inquiry and investigation." Clearly these remarks are at variance with the substance of the English decision cited.

In Connecticut Mutual Life Insurance Co. vs. Schwenck (2) the question at issue was whether an insurance policy had been invalidated by false statement of age made by the insured. Proof of his age

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(1) 16 Gray 171.

(2) 94 U. S 593.

by hearsay testimony was held inadmissible, as the issue in the case was not one of pedigree. Only the most liberal definition of the term "facts in issue" could extend it to include the date of the death of Susanna Blair in the case of Northbrookfield vs. Warren. Certainly the facts excluded by the Courts in Haines vs. Guthrie and Rex. vs. Erith were more nearly facts on which the issue depended than this.

It would seem that one must take other ground upon which to reconcile the contention in the cases, and refer once more to the question of genealogy.

Justice Stephen, in the trial of Haines vs. Guthrie, in a decision which was subsequently affirmed by the Master of the Rolls, gives an exhaustive examination of the English cases on this subject. Even here we find some conflict of authorities, and he seems content with the rather indefinite classification of "pedigree cases," and "not a pedigree case."

It will be noticed that in all cases in which this evidence was excluded it was not, under the definition which we have considered, evidence of pedigree; or, in other words, the facts proved were not facts from which a genealogical inference was to be drawn. This is not the case, however, with the facts in Northbrookfield vs. Warren. Here clearly it became necessary to prove a question of pedigree, and as a relevant fact to that question arose another question of pedigree, the date of Susanna Blair's death. All the facts here were facts of pedigree within the definition.

It becomes apparent, then, that the basis of each decision is "what constitutes a fact of pedigree" and not essentially "what is a fact in issue." Viewing the cases from this aspect, they become easily recon-

cilable, though otherwise entirely dissimilar, particularly when we take into consideration the strong expressions of the Court in *Northbrookfield vs. Warren*.

II. Persons shown to be legitimately related by blood to the person to whom their statements relate, or by the husband or wife of such a person, may be declarants. (1) Statements made by a housekeeper of intestate as to who was his son, held inadmissible, though matter was one of pedigree. (2) Statement of an intimate friend also inadmissible. (2)

A bastard may not be a declarant as to his illegitimacy. (3) This is put on the ground that in the eyes of the law a bastard has no relations. How far statutes in the different States relieving the condition of illegitimate children may have changed this condition of affairs has not been determined.

In the case of *Crispin vs. Doglioni*, (4) the plaintiff was the natural son of Sir Henry Crispin, and entitled to certain portions of his property. Declarations made by a deceased brother of Sir Henry as to plaintiff's illegitimacy were held inadmissible, as the declarant was not connected with the plaintiff in the eyes of the law.

Declarations of a deceased husband as to his wife's legitimacy are allowed in evidence. (5)

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(1) *Shrewsbury Peerage Case*, 7 H. L. C. 26; *Northrop v. Hale*, 76 Me. 306; *Haddock v. B. & M. R. Co.*, 3 Allen, 298; *Conn. Life Ins. Co. v. Schwenck*, 94 U. S. 593; *Tyler v. Flanders*, 57 N. H. 618; *Steen v. Bowman*, 13 Pet. 209.

(2) *Johnson vs. Lawson*, 2 Bing. 86.

(3) *Cooke vs. Lloyd*, Pea. Ev. App. xxviii.

(4) 3 Sw. & Tr. 44.

(5) *Vowles vs. Young*, 13 Ves. 140; *Jewell vs. Jewell*, 1 How. 219.

On the same principle declarations by a mother regarding the relations which her son had with a woman, are admissible, even if such declarations bastardize the son's issue. (1) A deceased mother's declarations to the effect that her child was born before marriage are admissible. (2)

The strictness with which the rule requiring declarant to be related to the family is carried out is evidenced in the case of *Sturla v. Freecia*. (3) The question in the case turned upon the real time of the birth of one M. It appeared that M. had previously been consul to Genoa, and, wishing to become diplomatic agent, was examined by a committee of the executive government, called the Guinta, who reported favorably upon his application, and in the report mentioned M's age. An offer to place this report in evidence in regard to the actual time of M's birth was promptly rejected. The members of the Guinta were not shown in any way to be connected with M's family, nor, a further objection, is it known if all of them be dead.

These principles which we have stated in regard to the question of relationship are undisputed in the Courts, and consequently afford no difficulty. We find, however, that the glib statement requiring declarant to be related to the family has been the cause of a conflict in the Courts which we shall proceed to examine.

Three main cases form the field of this controversy,

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(1) *Barnum v. Barnum*, 42 Md. 251.

(2) *Haddock v. Boston & Maine R. R.*, 3 Allen 298.

(3) 5 App. Cas. 641.

and we will describe their facts seriatim, before the discussion has advanced further.

The first of these was *Monkton vs. Attorney-General*. (1) The question was whether George Troutbeck was related to Samuel Troutbeck. John Troutbeck, declarant in the case, was clearly shown to be related to George, but as regards his relation to Samuel, there was as much dispute as over Samuel's relationship with George. Plaintiffs in the case claimed to be next of kin of Samuel Troutbeck, and offered in evidence a genealogical narrative and pedigree of the Troutbeck family in the handwriting of John. It was argued that John must be proved related to both Samuel and George before this chart could be admissible.

Following this came the American case of *Blackburn vs. Crawfords*. (2) One Dr. Crawfords died intestate. The Blackburns were his cousins-german, and claimed his estate as next of kin. This claim was contested by Crawfords who was the child of Crawfords' brother by a woman, whom it was alleged the brother had never married. The declarations in dispute were those made by one Sarah Evans, a sister of this woman, as to the marriage of her sister with Dr. Crawfords.

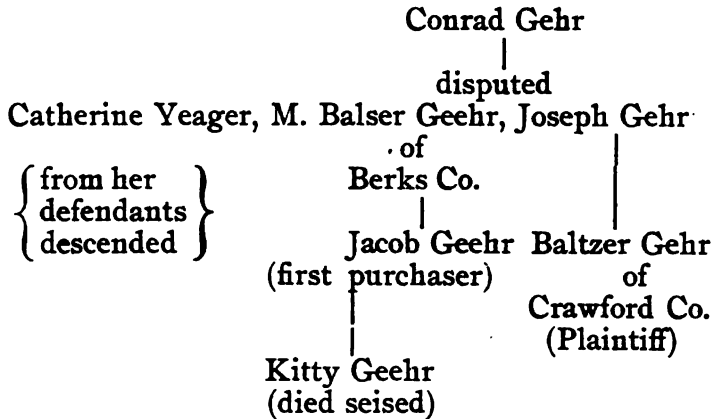
Finally, we have the Pennsylvania case of *Sitler vs. Gehr*, (3) one of peculiar interest. It was an action of ejectment between parties alleging to belong to the same family, and the following pedigree becomes necessary in order best to understand it:

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(1) 2 Russ. & M. 147.

(2) 3 Wall. 175.

(3) 105 Pa. St. 577.



It was proved that Balser Geehr, of Berks, was the son of Conrad Geehr. The evidence objected to in this case was that given by the plaintiff regarding declarations of his mother as to Balser Geehr, of Berks, being plaintiff's uncle. It was urged, as in *Monkton vs. Attorney-General*, that there was no evidence connecting the declarant with both branches of the family.

In *Monkton vs. Attorney-General*, the paper in the handwriting of John Troutbeck was admitted as evidence. In *Blackburn vs. Crawfords*, the statements of Mrs. Evans were flatly rejected, and in *Sitler vs. Gehr*, the testimony of the plaintiff as regards his mother's declarations was held admissible. Here is a most positive divergence of views.

It may be of advantage in this connection to seek for the reason for the rule as regards declarations on pedigree. Lord Mansfield, in the *Berkeley Peerage Case*, (1) says: "Pedigree is an exception to the 'hearsay rule.' Since it is impossible to prove by

(1) 4 Campbell, 401.

living witnesses the relationships of past generations, declarations of deceased members are admitted. Hearsay of family as to these particular facts is not excluded." The declarants must be shown to be related to the family of which they speak, since it is presumed that relatives have the best means of obtaining knowledge on such matters. The object primarily is, of course, the one for all evidence, the best means of procuring the truth. To render this more certain the question of *ante litem motam* is introduced, and declarations upon pedigree are not admissible if made after the controversy in question has commenced. This point will be discussed at length later; we will content ourselves for the purposes of the present discussion with the simple statement of it.

It would appear, however, that the difference between the three cases which we have before us arises from the fact that the judges in the case of *Blackburn vs. Crawford*s recognized the insufficiency of the safeguards against deception placed around the rule, and endeavored to evade them in this particular case. Mr. Justice Swayne was, probably, materially influenced by the thought that no matter what the circumstances might have been, *ante litem motam* or otherwise, it was highly improbable that Mrs. Evans would make statements charging her sister with criminal relations or open adultery; or that she would feel herself in honor bound to tell the truth if questioned on such a subject. Still, under the rule as laid down in *Monkton vs. Attorney-General*, and *Sitler vs. Gehr*, this evidence should unquestionably have been admitted. When evidence of such doubtful

character as this can be freely introduced, an amendment may be of advantage.

Lord Broughman, in the case of *Monkton vs. Attorney-General*, went into an elaborate discussion to prove the absurdity of showing the declarant related to both branches of the family. An easy catchpenny phrase, "things that are equal to the same thing are equal to each other," filled his ear, and induced him to lose sight of the main reason for the rule. "Connected with the family," is an expression conveniently vague, behind which the Courts have taken refuge in a number of instances. To speak of its not being necessary to prove declarant connected with both branches of the family, depends upon a contingency, as the two branches may be, in reality, two distinct families. In *Sitler vs. Gehr*, for example, a failure to connect the father of Balser Gehr, of Crawford Co., with the original ancestor, Conrad, at once leaves that line of family a distinct affair, standing by itself.

We have, then, declarations made in regard to pedigree in the family of this Conrad, made by persons having no connection with the family whatever. Here is a positive contradiction of the terms of the rule. Indeed, in this case, the examination of authorities by the Court seems to have been made in a peculiarly slovenly way. Mr. Justice Paxton seems to draw no distinction between the decision which he renders, and the one given in *Blackburn vs. Crawfords*, imagining, apparently, that the latter supports his view of the question.

There arises in these cases a species of ante litem motam distinction which it may not be unprofitable to



examine. The statements in *Sitler vs. Gehr* are made after the date of the disputed part of the pedigree. The infinitude of motives which might arise, leading people of similar name or dwelling-place to connect themselves by their own statements with other families, might occur even before any legal controversy. Pride, a desire for succession in the future, might be mentioned. Cases on motives similar to those which probably induced the statements in *Blackburn vs. Crawfords*, might be multiplied to excess. We have, however, on the other hand, the difficulty of confining the rule, as the limitation of it may prevent altogether the decision of a number of important controversies, evidence on the question not being forthcoming. Had the declarant in *Blackburn vs. Crawfords* belonged to the family of Dr. Crawfords, his statements as to the doctor's marriage would have been in a measure declarations to his own interest, and hence less liable to be biased. Or had the declarations in *Sitler vs. Gehr* emanated from some relative of Baltzer Gehr, of Berks, whose relationship to the original ancestor was undisputed, the establishment of plaintiff's connection with the family would have been effected from a source into which prejudice was least likely to enter.

In the present condition of the law, persons who may be in no way connected with the family of which they speak, may have their statements offered in evidence. The place in the line of descent which is in dispute may antedate their lives, and yet still their testimony is admissible in evidence.

It must be remembered that the main object of restrictions upon the admission of evidence is to obtain statements of the most truthful character. Declara-

tions on pedigree, not being under oath, have all the uncertainty which prejudice or carelessness would be likely to give such statements. The rule in regard to ante litem motam has been devised to eliminate the question of prejudice, but that it fails to do so entirely, we have seen. Whether some suggestion such as has been laid down would answer the purpose or not, cannot positively be stated, yet the consideration of it may not be utterly barren of results.

As the law stands at the present the connection of the declarant with either the family or plaintiff or defendant suffices.

Declarations as to pedigree made after the controversy on the question has begun are inadmissible. These are known as post litem motam declarations. (1)

What constitutes the beginning of the controversy? Litigation need not be actually begun. Unless a controversy had arisen between two or more persons upon the point to which declarations related, which controversy had actually produced litigation between them, or which probably must tend to such a result; the declarations are made ante litem motam. (2) The expression, ante litem motam, here obviously means simply before a dispute between the parties, tending ultimately toward litigation, though litigation need not necessarily have begun.

Provided controversy actually exists, it is not necessary to show that declarant was aware that the

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(1) *People vs. Fire Ins. Co.*, 25 Wend. 205; *Berkeley Peerage Case*, 4. Camp. 401; *Steen vs. Bowman*, 13 Pet. 209; *Chapman vs. Chapman*, 2 Conn. 347; *Northrop vs. Hale*, 76 Me. 306; *Comm. vs. Felch*, 132 Mass. 23; *Barnum vs. Barnum*, 42 Md. 251; *Canjolle vs. Ferrié*, 23 N. Y. 90.

(2) *Berkeley Peerage Case*, 4 Camp. 401; *DeHaven vs. DeHaven*, 77 Ind. 236.

discussion was in progress or not. (1) This, of course, is a natural result of the dislike of the Courts to introduce any more hearsay testimony than may be deemed actually necessary.

The language of Chancellor Walworth in *People vs. Fire Insurance Company* (2) contains the statement that declarations of deceased relatives are not to be absolutely rejected because there is room for suspicion that they may have been given for a sinister purpose, if the party making them has no interest in establishing their truth, unless the controversy has begun.

The statements brought in evidence may contain internal evidence of *lis mota*, in which case they are inadmissible. As an illustration of this principle we have the case of *Butler vs. Mountgarret*. (3) A, B and C were heirs expectant to an estate. B married Miss H. T., issue a son, who (A being dead) succeeds to the estate. C now brings an action of ejectment, alleging that B having previously contracted a marriage with a Miss C, his issue by the subsequent marriage were illegitimate. A letter was offered in evidence written by A to C stating admissions of B as to a marriage with Miss C, but asserting a doubt as to its validity, and showing a discussion of the matter. This letter was held to contain internal evidence of the commencement of a controversy and hence became inadmissible. In this case it was not necessary to give evidence of *lis dehors*.

An entry made of a fact of pedigree, qualified by

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(1) *Berkeley Peerage Case*.

(2) *Supra*.

(3) 7 H. L. C. 633.

the statement that it is made for the express purpose of establishing this point in case it was ever called into question, would be admissible in evidence. The facts of the Berkeley Peerage Case (1) support this. "The particularity of this," observes Lord Mansfield, "would be a strong circumstance of suspicion."

The qualification in regard to the necessity of statements having been made ante litem motam, which has been just discussed, is the main qualification which Courts have made in regard to declarants; whether the rules on their relationship could be still more limited and with advantage, cannot be stated with certainty. We have contented ourselves with pointing out what appear to be a few essential defects in the system, and presenting the arguments pro and con in every case.

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(1) *Supra*.

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## NOTES.

The Faculty of the Law School have made some changes in the curriculum as announced in our July number. Constitutional Law in the third year is changed from a compulsory to an elective subject. Partnership, originally announced as a third year elective, is transferred to the second year, where all courses are compulsory and Commercial Paper, from the second year, is substituted. The assignment of instruction in the subjects remains, however, as hitherto announced.

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The necessity of reform in the statute law of Pennsylvania is again apparent from an examination of the Pamphlet Laws of 1895. In the first place, our acts should contain a short title. Accuracy and convenience of citation require it. The current short method of citation by the day of the month and year

is accurate only when it happens (which is very infrequently) that but one bill is enacted into a law on that day; while an added reference to the pages of the Pamphlet Laws or a digest can hardly be said to be anything more than a convenient note of the place of publication of the statute. Again, the method of citing the act by its long title, with the date of its enactment, which is seldom adopted, is far from convenient, especially where frequent repetition is necessary. While, therefore, it must be admitted that under the present methods the reference is generally sufficiently explicit as not to mislead, yet there is wanting that strict accuracy, combined with convenience, which the law needs and demands. The British Parliament has adopted the short title in all public acts and the change has met with general satisfaction.

But more important than the short title is the need for the appointment of a commission of competent lawyers to act as counsel to the Assembly and the Governor in the enactment of statutes.

The nature and duties of such a commission are generally known. It infringes in nowise on the independence of the Legislature; it simply endeavors that the exact intention of the Legislature shall be expressed in its statute and no more; and counsels as to the constitutionality of pending legislation. The ignorance and carelessness displayed in the drafting and enactment of our laws demands a remedy and the experience of other jurisdictions similarly situated has demonstrated that the appointment of a statutory commission is the most effectual. In England, Parliament has its Parliamentary Counsel; and New York, through the efforts of its State Bar

Association, has now its Statutory Commission. (See paper read by Prof. J. Newton Fiero before the Pennsylvania Bar Association.) (1) There must be some change in Pennsylvania, and it is only a question of time when this or some other remedy must come.

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# THE QUIZ.

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It is the general purpose of this department of the Pennsylvania Law Series to direct attention briefly to such changes as from time to time shall occur in the body of the law, either through new or different applications of the principles of the common law or by means of statutory enactments.

It is intended to accomplish this by means of a carefully prepared system of questions and answers; the questions, where practicable, being obtained from some leading specialist in that branch of the law in which the change occurs, and the answers presenting the reason, as well as the substance, of the change.



## **Are the Jury in Criminal Cases in Pennsylvania Judges of the Law?**

The ambiguity of the expression : "The jury in a criminal case are judges of the law and the fact under the direction of the Court," has made possible a contention, which arose through a misapprehension of the heated disputes as to the power of a jury, especially in cases of libel, to render a general verdict, that the jury in a criminal case are judges of the law as law and distinct from the facts. This unfortunate ambiguity has been further increased by the very common dropping of the last clause and rendering it thus : "The jury in a criminal case are judges of the law and the fact." In both Federal and State Constitutions, statutes and judicial opinions, the clause, "under the direction of the Court," is almost universally added. The phrase in its entirety has become a legal formula used repeatedly to define the power of juries in criminal cases. It should not be cut in two. Despite its continued use it is not certain in all jurisdictions just what the phrase means.

The question arising from this doubt presents itself in two forms ; first, have the jury the right to decide all the law involved in the case ; or, second, have they the right to decide so much law only as is involved in making up a general verdict.

The first question can be answered in the negative at once. No one will claim that the jury are judges of the sufficiency of an indictment, the competency of witnesses, or the admissibility of evidence. These are all points of law ; they are involved in the case ; but it is undoubtedly the Court's right to decide them.

The jury, therefore, admittedly cannot decide all the law of the case. This, indeed, is an argument against the existence of the lesser right, both because it is anomalous that the function of deciding the law should be a divided one, and because the language of Constitutions and decisions which it is usually claimed secure to the jury the lesser right is broad enough to grant the whole right if it grants any part. There are no limiting words.

But passing over this, the second question about which the contention centres, may be restated to better define its limits thus: Are the jury in a criminal case bound by their oath and their duty to accept the law as laid down by the Court as authoritative in making up a general verdict, or may they rightfully disregard the Court's instructions and determine the law of their own opinion in contradiction thereto. Those on the one side liken the law laid down by the Court to a standard of measure which the jury must apply to the facts as nearly as possible after the manner of a yardstick to a piece of cloth. They contend that the provinces of juries in civil and criminal cases differ in no respect, with the exceptions that in the latter the jury have the power but not the right to disregard the law given them by the Court; and that a binding instruction may not be given. Those on the other side contend that though the Court has the more accurate knowledge of the law, and the jury should not, therefore, lightly disregard its instructions, yet as a necessary bulwark against the tyranny of judges, they have the right to do so in making up a general verdict, if their opinion of the law contradicts that of the Court. Or the question

may be put thus: Three rights are involved: first, the right to determine the law; second, the right to determine the facts; third, the right to determine the result of the law applied to the facts, or, the right to return a general verdict. The one side denies to the jury the first of these rights, but grants the last two. The other claims for the jury all three rights.

The issue is thus clearly joined. How it would be decided should it again be presented to the Supreme Court of Pennsylvania is by good authorities considered doubtful.

As far back as 1692, a Colonial Court of Quarter Sessions had before it a series of four trials for libel: *Proprietor vs. Keith, Bradford, Budd, and Boss*. (Pennypacker's Col. Cases.) In the trial of Boss evidence of the truth of the alleged libellous statement was offered and admitted, and in the trial of Bradford it was left to the jury to find a general verdict, a right which was not established in England in libel cases until the passage of Fox's Libel Bill (32 Geo. III., c. 60). When Andrew Hamilton came to Philadelphia, in 1713, the heat of the controversy which these trials aroused must still have been warm in the hearts of indignant Quakers (the libels were mainly against their sect); and no doubt many of the pamphlets it called forth were still to be found on office shelves. It is not too much to presume that as a lawyer he had become familiar with these trials long before he went to New York to take part in the famous trial of John Peter Zenger in 1735. That his argument there was based on this knowledge and that it largely induced the decision of the Court needs to have added to it only that the notoriety given to

the Zenger trial is said to have done much toward the passage of Fox's Libel Bill to establish the claim that "the modern doctrine of the liberty of the press was established, not in the trial of John Peter Zenger in New York, but in the trial of William Bradford, in Pennsylvania, and the encomiums which have been bestowed upon Andrew Hamilton, the lawyer, must be given with stronger emphasis to Samuel Jennings and his colleagues, the Quaker Judges." (Pennypacker's Col. Cases, 138.) Though not expressly decided in these cases, it is plainly taken for granted that the jury in forming their general verdict, the first general verdict in a case of libel of which we have any record, should not attempt to decide the law as distinct from the fact. Just one hundred and one years later was decided the case of *Penna. vs. Bell* (Addison 156) in which the Court used this language: "The laws must operate by certain rules, not the casual feelings of jurors; and jurors must judge of the facts according to the certain rules of law. For miserable would be our situation if our lives depended not on fixed rules, but on the feelings which might happen to be excited in the jurors who were to try us. \* \* \* You may find according as you believe or disbelieve the facts, and comparing the facts with the rules of law, that the prisoner is guilty or not guilty, or guilty of manslaughter, or you may find the facts specially, \* \* \* but you cannot, but at the peril of violation of duty, believing the facts say that they are not what the law declares them to be; for this would be taking upon you to make the law, which is the province of the Legislature; or to construe the Law, which

is the province of the Court." Coming down to 1845, there is a case decided by Mr. Justice Rogers, of the Supreme Court of this State, at a special Court of Nisi Prius held at Philadelphia in April of that year. (Wharton on Homicide, App. 721.) The language employed by the Court is equally as strong as that just quoted. "You are, it is true, judges in a criminal case in one sense of both law and fact; for your verdict as in civil cases must pass on law and fact together. \* \* \* It is important for you to keep this distinction in mind, remembering that, while you have the physical power, by an acquittal to discharge a defendant from further prosecution, you have no moral power to do so, against the law laid down by the Court. \* \* \* For your part, your duty is to receive the law, for the purposes of this trial, from the Court. If an error injurious to the prisoner occurs it will be rectified by the revision of the Court in banc."

In *Commonwealth vs. Van Sickle* (Brightly 73) the jury were instructed: "The issue in this case narrows itself to a single point, and that point, if you believe the evidence on both sides, is one of law, on which it is your duty to receive the instructions of the Court." *Commonwealth vs. Harman* (1846; 4 Pa. St. 269) and *Commonwealth vs. Hutchinson* (1876; 82 Pa. St. 472) are in line with these decisions, though less explicitly so; the latter being sometimes misquoted as authority on the other side. So far all is plain sailing but in 89 Pa. St. we run amuck of *Kane vs. Commonwealth* (p. 522). In that case Chief Justice Sharswood, in an opinion which shows internal evidence of being hastily prepared and ill-considered,

decides apparently in flat contradiction to these cases, and holds apparently that the jury are to look upon the instructions of the Court as the best evidence of the law, but not necessarily binding upon them. It has been said the Chief Justice "apparently" so decided, because though his words seem plain enough, a later decision of the Supreme Court implies that they have another though less evident meaning. (*Commonwealth vs. McManus* 143 Pa. St. 64.) There is one sentence, however, most explicit, which he quotes from an opinion delivered by Mr. Justice Baldwin (*U. S. vs. Wilson*, Baldwin 99) "as a model to be followed by other judges." It is: "But if you are prepared to say that the law is different from what you have heard from us, you are in the exercise of a constitutional right to do so." The following words are his own: "The argument in favor of their taking the law from the Court is addressed very properly ad verecundiam. The Court is appointed to instruct them and their opinion is the best evidence of what the law is."

Since this case there has been one other following it. (*Nicholson vs. Commonwealth* 96 Pa. St. 502.) But the tenor of the instructions to the jury is such that the case may be said to have taken one step back toward precedent, and toward the fundamental theory of the separate functions of Court and jury. While in yet another case, decided in 1890 (*Fischer vs. R. R. Co.* 131 Pa. St. 292, 297), there is a dictum as follows: When material facts are in doubt or inferences of fact are to be drawn from the testimony, "it is the exclusive province of the jury to determine what the facts are, and apply them to the law as



declared by the Court. The line of demarcation, in that respect, between the duty of the Court, and that of the jury should be carefully guarded. While, on the one hand, the Court should never permit the jury to disregard or evade its instructions as to matters of law, it should be equally careful not to invade the province of the jury." In 1891 the case alluded to in connection with *Kane vs. Commonwealth* was decided, namely *Commonwealth vs. McManus* (143 Pa. St. 64). In that case, Mr. Chief Justice Paxson denies explicitly the right claimed for the jury. This he harmonizes with *Kane vs. Commonwealth* by saying virtually that though the instructions of the Court are but evidence of the law, they are the best evidence obtainable and, therefore, the jury must receive their evidence of the law from the Court as they receive their evidence of the facts from the witnesses. To refuse to do either is to disregard their oaths. His words are: "That is to say, in the language of the Constitution, they were to determine 'the law and facts, as in other cases' under the advice and direction of the Court; they were to look to the Court for the best evidence of the law, just as they look to the witnesses for the best evidence of the facts. Thus interpreted and thus administered, this seeming paradox in our criminal law becomes intelligible. A judge who instructs a jury in a criminal case, that they may disregard the law as laid down by the court, errs as widely as the judge who gives them a binding instruction upon the law. It is the duty of the jury to take the best evidence of the law, as it is to take the best evidence of the facts. When they refuse to do either they

disregard their duty and their oaths." Mr. Justice Mitchell in his concurring opinion in the same case goes into the question fully and learnedly to "put an end" as he expresses it, "once and for all to a doctrine that I regard as unsound in every point of view, historical, logical or technical." His argument seems conclusively to establish his opening statement that, "the jury are not judges of the law in any case, civil or criminal." The unequivocalty of this is pleasing. But to most minds *Kane vs. Commonwealth* is equally decided on the other side, in spite of the path Mr. Chief Justice Paxson points out to get around it. When counsel, most likely for the defence, urge the latter and the prosecution the former, what will be the decision? It is submitted that *Commonwealth vs. McManus* embodies the sounder view, "historical, logical and technical."

Our whole judicial system is based upon the separation of the functions of Court and jury. They have been established as separate tribunals for the decision respectively of law and of fact. We cannot discover a time when the rule did not exist: "*Ad questionem facti non respondent iudices, ad questionem juris non respondent juratores.*" That such a fundamental principle is reversed in criminal cases would require the clearest of proof to establish. To the contrary, we find the Court organized in accordance with these fundamental principles of our judicial system, similar to a civil court, apparently designed for the performance of the same functions, and to all outward appearances exactly the same functions being performed. Back of these appearances, as a matter of fact, exactly the same functions are performed in

part always, and in their entirety occasionally, in the case of a special verdict. The conclusion which follows naturally from these premises is just the reverse of that which would graft an anomaly on our judicial system by violating its foundation principles in allowing the jury to usurp the function of the Court.

The decision of questions of law in a trial rests as a duty upon either the Court or the jury. It is necessarily the duty of one or the other. Whichever one whose duty it is can, of course, be compelled to perform it. The wheels of justice may not be permitted to stand still. It is the jury's duty to decide the law, and if the defendant, for instance, believes the Court has wrongly instructed the jury, he should have a right to avail himself of the provision of the law that the "jury are judges of the law in a criminal case," and demand that they "interpose their shield between him and the tyranny of the judge!" If the law makes the jury judge of the law, it gives the defendant or the prosecution a right to insist that they exercise that function. But we know that no such demand will be entertained by any Court; that the jury may, regardless of anyone's pleasure but their own, bring in a special verdict, and cast the law upon the Court. Whence came this right to transfer their duty to the Court? The Constitution and the laws say the jury shall judge the law, and the defendant claims this right; how, pray, is it, then, that the jury can step in and say, "We will not judge of the law; we will judge of the facts only, and leave the law for the Court?" Even if they should render a general verdict it would be impossible to tell whether they had

performed their duty to decide the law, as they render no decision of law separate from the facts. As opposed to this, there is a Court required to be learned in the law, charged with the duty of determining the law in an opinion to be delivered as instructions to the jury, regularly performing this duty, liable to be compelled to perform it, liable to be compelled to remedy any incompleteness in its performance by answer to "Points," and subject further to the duty of determining all the law in the case of a special verdict, and liable to be compelled to do so. Furthermore, it must answer to a superior court for mistakes in performing this, its duty. This contrast between what may be required of the Court and of the jury, and consequently between their rights and duties, is further heightened by the corresponding contrast between the oath of judges and that of jurymen. The former swear to "support, obey and defend the Constitution of the United States and the Constitution of the Commonwealth;" the latter swear, alike in civil and criminal cases, "a true verdict to give according to the evidence." To the same effect is the sixth article of the Federal Constitution, which, after declaring that the Constitution, laws and treaties of the United States shall be the supreme law in the land, proceeds: "And the judges in every State shall be bound thereby." If the jury are to determine the law in criminal cases, why was this command laid upon the judges alone? Surely the Constitution, laws and treaties of the United States are not to be disregarded in criminal cases. If not, who is to enforce them? The jury are not commanded to, they are not sworn to. But the judges are both commanded and sworn to.

Certainty, that which is to be desired in law next to justice, is sacrificed if the law is to be left to ignorant juries, to decide in secret, without any subsequent publication of the substance thereof, and consequently no perpetuation thereof. There would be no telling whether the jury had decided the law other than as the Court instructed, or whether their verdict went on an insufficiency of facts, or resulted from a wilful violation of their oaths. The law as administered in the past is thus rendered uncertain, and the law to be administered in the future rests upon the most unstable of foundations, the passions and prejudices of men.

"It is a poor rule that will not work both ways." It is assumed by those who argue for the jury that they will always exercise this right in favor of the defendant. But juries are not always inclined in the same direction. Verdicts are sometimes rendered even against the weight of the evidence. Had they the right, it must happen that, at times, the jury would construe the law more harshly than the Court against the defendant. In such case there would be no remedy, in the trial court at least, for the jury being judges of law, of fact, and of law and fact together, there would be nothing for the Court to do but accept their decision as final. The trial judge would never have the right to set aside the verdict. It is utterly inconsistent to say that the jury are the sole judges of the law, and may differ from the Court, and yet allow the Court to set aside the verdict as being contrary to the law as determined by the Court. As the latter half of this inconsistency is undoubtedly true, the first half cannot be.

If the jury are judges of the law, it must be

admitted either that they are superior to the Supreme Court, having power to review their decisions whenever the same points are involved in another case, or that the decisions of the Supreme Court only and not those of other courts are binding on the jury. Neither position seems very consistent. The first, certainly, is not; while the second would prevent a decision from becoming a precedent, even in the Court in which it was given, because no jury has power to bind another.

Again, the power to judge of the law would render the jury superior to the Legislature. It would enable the jury to determine the constitutionality of statutes, and by an adverse decision to set aside the deliberately expressed will of the Legislature. The result might well be that a statute would be decided to be in force in one county and not in another, causing a startling lack of uniformity. The importance of this consideration in the Federal jurisdiction is thus stated by Mr. Justice Chase (Wharton's State Trials 688, also quoted in 156 U. S., 71): "If this power be once admitted, petit jurors will be superior to the national Legislature, and its laws will be subject to their control. The power to abrogate or to make laws nugatory is equal to the authority of making them. The evident consequences of this right in juries will be that a law of Congress will be in operation in one State and not in another. A law to impose taxes will be obeyed in one State and not in another, unless force be employed to compel submission. \* \* \* The effects of the exercise of this power by petit jurors may be readily conceived. It appears to me that the right now claimed has a direct tendency to dissolve the union

of the United States, on which, under divine Providence, our political safety, happiness and prosperity depend." Mr. Justice Baldwin, one of whose earlier opinions is often quoted on the other side, expressed the same idea, thus (*U. S. vs. Shive*, 1 *Bald.* 510, 513): "If juries once exercise this power, we are without a constitution or laws; one jury has the same power as another; you cannot bind those who may take your places; what you declare constitutional to-day another jury may declare unconstitutional to-morrow."

The contrast between the abundance of authority on the one side, and its absence on the other, is extremely striking. The array on the side of the Court embraces the names of Buller, Kenyon, Mansfield (Dean of *St. Asaph's Case*, and *Rex vs. Withers*, 3 *T. R.* 428), Hardwicke, (*King vs. Poole*, *Cas. Temp. Hardwicke*), Abinger, (*Regina vs. Parish*, 8 *C. & P.* 94), Tindal, (*Bishop of Meath vs. Marquis of Winchester*, 4 *Cl & Fin.* 445, 457). See also *Townsend's Case*, 1 *Plowden* 111, 114; *Rex vs. Oneley*, 2 *Str.* 766, 773; Hargrave's note to *Coke*, *Litt.* 155 b. In this country: *Story*, (*U. S. vs. Battiste*, 2 *Sumn.* 240); *Curtis*, (*U. S. vs. Morris*, 1 *Curt. C. C.*, 23, 49); *Chase*, (*Wharton's St. Trials* 688, 713, 714); *Thompson*, (*People vs. Croswell*, 3 *Johns Cas.* 337, 362, opinion of *Parker C. J.* and *State vs. Croteau*, 23 *Vt.* 14, opinion of *Bennett J.*); *Baldwin*, (*U. S. vs. Porter*, 1 *Bald.* 78, 100, 108, and *United States vs. Shive*, 1 *Bald.* 510, 513); *Field*, (*U. S. vs. Greathouse*, 4 *Sawyer* 457, 464); *Harlan*, *Jackson*, *Brewer*, *Brown*, (*Sparf and Hansen vs. United States*, 156 *U. S.* 51). The following may be noted among t

State decisions: *Commonwealth vs. Anthes*, (Shaw, C. J.), (5 Gray 185, 208, 218); *Commonwealth vs. Rock* (10 Gray 4); *Duffy vs. People*, (26 N. Y. 588, 592); *Hamilton vs. People*, (29 Mich. 173, 192); *State vs. Burpee* (65 Vt. 1, 34); *State vs. Smith*, (6 R. I. 33, 34); *Pierce vs. State*, (13 N. H. 536, 554); *People vs. Anderson* (44 Cal. 65, 70); *Montgomery vs. State* (11 Ohio, 427).

It is difficult to see what can be put in the other side of the scales to balance this weight of authority. Mr. Justice Curtis (*United States vs. Morris*, 1 Curtis, 23), could not discern much in that tray of the scales. He says: "Such (i. e., separate functions) is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any Court in England, prior to the formation of the Constitution which conflicts with it." And Mr. Justice Mitchell remarks at the close of his opinion in *Commonwealth vs. McManus*: "As already said, there is not a single respectable English authority for the doctrine in question; and against the foregoing solid phalanx of the best American judicial and professional opinion, I have not been able to find a single well-considered case except *State vs. Croteau*, which, as already seen, was by a divided Court;" (and it may be added, has since been reversed). We may, however, discern six classes of arguments heaped into the tray of the scales which is now under scrutiny. These are the arguments most commonly advanced, and chiefly relied upon to support the jury's contention. They are:

1. Libel cases decided during the controversy which resulted in Fox's Libel Act.



2. The passage of that Act.
3. Bushell's Case.
4. Power to do so.
5. Power to do so equals right.
6. State vs. Croteau.

The first and second of these may be treated together. The line between law and fact in cases of libel had been drawn thus: The alleged libel being in writing its terms were not in dispute; it remained only to decide the fact of publication, the truth of the innuendo, and the libellous intent. It had long been held that the first two of these were matters of fact and for the jury, but that the last, the inference of libellous intent or otherwise, was matter of law and for the Court. It was so held in the Dean of St. Asaph's Case. Thus deciding, it may be incidentally remarked, that whatever was matter of law was, and theretofore had been, for the Court. It was argued by counsel, for at the time the dispute was raging high, both in and out of Court, that the inference of libellous intent is not matter of law and for the Court, but mixed of law and fact and therefore for the jury, and proper for them to decide by bringing in a general verdict, as in other cases. In other words it was a contention whether or not the jury had a right to bring in a general verdict in libel as in other cases. The claim that the jury may decide the law in criminal cases grew out of this dispute, but was not embodied in it. Fox's Libel Bill was framed and pointed to the exact point in controversy. While it gives the jury the right to render a general verdict of guilty or not guilty upon the whole issue in cases of libel, it is equally careful of the Court's right to

pass finally upon questions of law. An examination of its wording bearing out these statements will be found in *Commonwealth vs. McManus*. Arguments based on either of these two grounds are, therefore, not in point, except, indeed, as they indirectly go against the jury's claim, as pointed out in the *Dean of St. Asaph's Case*.

Much reliance is placed upon *Bushell's Case*, decided by Chief Justice Vaughan (Vaughan 135). The accused was acquitted, it was charged, by a general verdict in opposition to the directions of the Court. Upon the jurors being fined and committed to prison in default of payment, habeas corpus proceedings developed the issue whether for the decision the jurors were liable to fine or imprisonment. It was decided that they were not. This decision, if the case be examined, will be found to be based on the narrow ground, that because a general verdict of necessity resolves "both law and fact complicately, and not the fact by itself," it could never be proved that the jurors did not proceed upon their view of the evidence. Chief Justice Vaughan said that the words in the warrant, "that the jury did acquit against the direction of the Court in matter of law, literally taken, and de plano, are insignificant and not intelligible; for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence ever was or can be given to a jury of what is law or not, nor no such oath can be given to or taken by a jury, to try matter in law; nor no attainr can lie for such a false oath." This language needs no comment; but the frequent citation of the case upon the side of the question which we are now

considering goes far to support the charge of misapprehension.

There is also a remarkable argument after the analogy of might makes right to the effect that because the jury have the power they have the right to disregard the Court's instructions. The same reasoning would give them the right to disregard the evidence. It would be passed over without mention were it not that Chief Justice Sharswood advanced it, as was before noted, in *Kane vs. Commonwealth*.

The decision in *State vs. Croteau* (23 Vt. 14) is often pointed to. But whatever weight it might have had as being a decision by a State Supreme Court has been taken away by the fact that it has been reversed by a subsequent unanimous decision of the same Court: *State vs. Burpee* (65 Vt. 1, 34). The following conclusions were there reached; conclusions which apply equally appropriately in our own State, and which may, therefore, be quoted to conclude this article: "We are thus led to the conclusion that the doctrine that jurors are the judges of the law in criminal cases is untenable; that it is contrary to the fundamental maxims of the Common Law from which it is claimed to take its origin; contrary to the uniform practice and decisions of the Courts of Great Britain, where our jury system had its beginning, and where it matured; contrary to the great weight of authority in this country; contrary to the spirit and meaning of the Constitution of the United States; repugnant to the Constitution of this State; repugnant to our statute relative to the reservation of questions of law in criminal cases and passing the same to the Supreme Court for final decision."

JAMES S. ROGERS.

III

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**FROM THE LEGAL INTELLIGENCER**

**PHILADELPHIA, APRIL 10, 1896.**

**GREENLEAF ON EVIDENCE.**

"The object of this edition is to bring Prof. Greenleaf's original work down to date by leaving the text unchanged and adding to his own notes those cases wherein the text has been commented upon or illustrated by the decision. Cases in which the text has been commented upon are distinguished from those of the original edition, as well as those merely illustrative thereof, by the fact that the date of the decision is annexed thereto.

"The larger number of citations contained in the notes to the first volume, other than those of the original edition, are cases in which the language of the text has been commented upon, so that, in effect, the notes form an index to a series of judicial interpretations of the author's text.

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